# MEETING ON GENERAL REVISION OF THE U.S. COPYRIGHT LAW

Library of Congress Whittall Pavilion
Washington, D. C.

Wednesday, January 16, 1963
10 a.m. to 12 noon
2 p.m. to 4:30 p.m.

January 16, 1963

PRESENT

Abraham L. Kaminstein
Chairman

Julian T. Abeles, Music Publishers Protective Association, Inc.
Eugene N. Aleinikoff, National Educational Television and Radio Center
Thomas C. Brennan, U. S. Senate Judiciary Committee
Charles H. Brown, ASCAP
Fulton Brylawski
Robert J. Burton, Broadcast Music Inc.
Robert V. Cahill, National Association of Broadcasters
George D. Cary, Copyright Office
Richard Colby, Motion Picture Association of America, Copyright Committee
Walter J. Derenberg, Copyright Society of the U. S. A.
Sidney A. Diamond, London Records
Joseph S. Dubin, Universal Pictures Company, Inc.
W. W. Ehrmann, American Association of University Professors
Simon R. Epstein, Government Printing Office
Robert V. Evans, Columbia Broadcasting System, Inc.
John Farmakides, National Aeronautics and Space Administration
Bernard Feiner, Department of Health, Education, and Welfare
Herman Finkelstein, ASCAP
Scott R. Foster, U. S. Atomic Energy Commission
Robert W. Frase, American Book Publishers Council
Herbert Fuchs, U. S. House Judiciary Committee
H. L. Godfrey, Department of Justice
Morton David Goldberg; Foster, Ginsberg & Schwab
Abe A. Goldman, Copyright Office
A. H. Helvestine, Department of Defense
Theodore R. Jackson; Gilbert & Gilbert
Irwin Karp, Authors League of America
Sydney M. Kaye, BMI
Leon Kellman, American Guild of Authors and Composers
Elliott H. Levitas; Arnall, Golden & Gregory
William Lichtenwanger, Library of Congress
Mrs. Bella Linden
George Long, Bureau of Customs
Joseph A. McDonald; Smith, Hennessey & McDonald
Horace S. Manges, American Book Publishers Council
Isabelle Marks, Decca Records, Inc.
Mrs. Belle G. McGuire, American Association of University Professors
Ernest S. Meyers; Laporte & Meyers
L. Quincy Mumford, Librarian of Congress
Francis G. Naughten, National Science Foundation
Melville B. Nimmer, U.C.L.A. Law School
Spencer C. Olin, Walt Disney Productions
Harry R. Olsson, Jr., American Broadcasting Company
Harold Orenstein; Orenstein, Arrow and Lourie
Sigrid H. Pedersen, Paramount Pictures
John R. Peterson, American Bar Association

Mrs. Harriet Pilpel; Greenbaum, Wolff & Ernst
Daniel J. Reed, Library of Congress
Barbara A. Ringer, Copyright Office
Rutherford D. Rogers, Library of Congress
Harry N. Rosenfield
Stanley Rothenberg; Margulies, Heit & Rothenberg
Edward A. Sargoy, American Bar Association
Morton Schaeffer, American Bar Association
George Schiffer
John Schulman
Eugene J. Skora, U. S. Information Agency
Sigmund H. Steinberg, American Bar Association
William S. Strauss, Library of Congress
Samuel W. Tannenbaum, American Bar Association
Emmett E. Tucker; Hanson, Hanson & Cobb
A. H. Wasserstrom, Magazine Publishers Association, Copyright Committee
Philip B. Wattenberg
Michael W. Werth, Department of Justice
Jim Westbrook, U. S. Senate Judiciary Committee
John F. Whicher; Sargoy & Stein
Harvey J. Winter, Department of State
Clarence E. Witt, Library of Congress
Leonard Zissu

KAMINSTEIN. Ladies and gentlemen, we are honored to have with us the Librarian of Congress, who would like to say a few words before he has to go to another meeting. Dr. Mumford...

MUMFORD. Thank you, Kami. On behalf of the entire Library it is a pleasure to welcome you, and to greet you on this occasion. I should again like to express our great appreciation for the time and effort which you have given to the subject matter of copyright revision, and for the effort you will be giving today and in the future. I hope it won't extend indefinitely into the future.

I understand that all weapons were checked as you came in; I trust no one has any secret weapons. I hope that there may be some unity and harmony, although I realize that this may be wishful thinking.

I expect to be in and out during the meeting, and I wish I could stay for the entire time. This previous commitment, which Mr. Kaminstein referred to, was not deliberately prearranged, although Mr. K. informed me that if I had any intentions of remaining here, it showed utter lack of understanding of the circumstances. [Laughter] But, seriously, we do appreciate very much your effort in coming to this meeting, and I hope there will be very positive results from it. Thank you. [Applause]

KAMINSTEIN. Thank you, Dr. Mumford. We are also honored to have the Deputy Librarian of Congress, Mr. Rogers, who has been with us at other meetings and who has followed the progress we have been making very closely.

I should like to make a few routine requests. One, please do not move the microphones. The engineer has set them up so that they can remain in a fixed position. We do ask you to give your name when you speak. And, in order to enable us to get a transcript, please do not interrupt another speaker, since this makes it impossible to distinguish who said what.

Mrs. Lembo at the door later on will have a list of restaurants for those of you who are not acquainted with the neighborhood.

I think we enter a new phase today, that of actually beginning the drafting of a new law. I earnestly request the cooperation of everyone who has come to this meeting to enable us to get off to a good start. We have spent a good deal of time in preparatory study, and we now come to a task which should delight most lawyers--that of actual drafting.

We have received fine cooperation from Committee 304 of the American Bar Association and the subcommittees appointed by that Committee. As is apparent from our list of topics today, we cannot afford to wait for further committee deliberations. We will proceed and hope that the subcommittees can catch up and that, where we prepare drafts which affect the work of a subcommittee, it will turn its attention to the drafts and give us the benefit of its comments, criticisms, and suggestions.

The outline sent out to you indicates a general order of topics for study. This does not necessarily mean that we envisage eight different sessions; this is merely the general order in which we hope to tackle the problem of drafting the new law. Because of the time element, and because of the complexity of some of these subjects, we believe it will probably be necessary to hold meetings a month or six weeks apart. We have tentatively set the next meeting for February 20th, but you will receive a formal announcement of that meeting together with any draft language we have been able to prepare.

We welcome detailed suggestions on the language of the drafts we have prepared, but we do not especially welcome them at this meeting. I think that suggestions for technical changes would be more appropriate in written comments. Today we do want major suggestions and any general comments you may have on the draft, but please give us your substitute phrasing and technical comments in writing.

With that, I turn to the first section which deals with the general subject matter of copyright. I should like to ask Abe Goldman, General Counsel of the Copyright Office, to state: what our original recommendations were; some of the comments we have received on them; the points on which this particular draft departs from those recommendations; and some general comments on the language we have suggested. Abe...

GOLDMAN. Section 1 of the preliminary draft bill--I assume you all have it in front of you--is headed "Subject Matter of Copyright: In General." It deals with the subject matter that was discussed in Chapter 2 of the Register's Report, that chapter in the Report being headed "Copyrightable Works." In the main, this section 1 in the draft follows in substance the recommendations that were contained in the Register's Report, but with some differences--some fairly important differences, I think.

The Report mentioned two general requirements of copyrightability, one being fixation in tangible form, and the other being (in the words used in the Report) "original creative authorship." As to the first one, the opening sentence of Section 1(a) in the draft purports to cover works that are fixed in any and all tangible media that are now known or might be later developed. This covers the waterfront, we believe, with

respect to possible form; any tangible form would be adequate. That was the recommendation in the Report, and we have tried to carry it out in the language of Section 1(a).

Second, as to the Report's recommendation that a requirement for copyrightability be "original creative authorship," there were a number of people who commented to the effect that the word "creative" might possibly be understood by courts as implying a higher requirement of creativity than is required at present, and that therefore the word "creative" in this context was perhaps not desirable. You will note that in the second line of the draft itself we refer to "an original work of authorship." It is our feeling that the originality implicit in the present standard of creativity--and in what we had in mind by referring to a "creative work"--is implied in the phrase "original work of authorship." For this reason, and because of the fear some people expressed about the meaning that might be attached to the work "creative," we have omitted the word "creative" from the draft and have used instead the phrase "original work of authorship."

The Report recommended that we not use the phrase "all the writings of an author," now in section 4 of the law. The principal reason for this recommendation was that the statute should not purport to exhaust the power of Congress in the field of copyrightable material--in the field of works of authorship. Because the words "all the writings of an author" are virtually the same as the words of the Constitution, it was felt that the use of these words might imply not only that Congress intended to cover everything that could possibly be covered, but also that anything held not to be covered would have to be understood as beyond the power of Congress to provide for thereafter. Consequently, we have not used the words "all the writings of an author," and that corresponds with what we recommended in the Report. But we have covered the broad field, I believe, by using the phrase "an original work of authorship."

Then we have listed seven broad categories as being included in the subject matter of copyright. The purport here, as the Report recommended, was to cover in broad terms everything that is subject to copyright protection under the present statute. We have mentioned specifically, as the Report recommended, "choreographic works and pantomimes prepared for presentation to an audience." That's a new specification.

We have added, in item (7), "Sound recordings other than those accompanying motion pictures," which is not in the present law. Again, this is generally in accord with the recommendation in the Report that some protection be accorded sound recordings, although the Report does not attempt to say what this protection shall be. And regarding sound recordings, we have not, of course, indicated in this section some things that will have to be considered later. We are leaving for later consideration the extent to which sound recordings will be protected, what the rights in sound records will be, the ownership, the duration, and the conditions of

protection. These are open. All we've indicated here is that we think sound recordings should be made a subject of copyright protection, and the matter of the extent of the protection, the duration, and the conditions of protection are left for consideration at a later date.

In subsection (e) of Section 1, the last two lines on the first page of the preliminary draft, we attempted merely to codify the present concept of originality.

That is all, I think, I have to say now, Mr. Kaminstein.

KAMINSTEIN. Thank you, Abe. We'll open the discussion on any part of the section, although I suggest that we leave the last two clauses for a while and come back to them. Does anyone want to comment on the general structure, the question of creativity, or the omission of "all the writings of an author"?

FINKELSTEIN. Well, in the absence of anybody else taking the lead, Mr. Chairman, I should like to suggest that the word "original" be eliminated. Under the existing law the works of an author are protected, and the courts have given pretty careful definition to what constitutes authorship, in spite of the important difference between authorship under the copyright law and invention under the patent law. And I think that, as we begin to change, by statute, the definition of authorship, we may be getting ourselves into some consequences that we can't now foresee.

Though the word "creativity" comes out of the introductory part, the general definition, we find it put back in under the definition of "original," under subdivision (b) here. And, if you look at that subdivision, you find that "original" requires four elements. It requires that there be a creation, that that creation be independent, that it be the creation of an author, and that it not be copied from another source.

Let us assume that in copyright litigation, the defendant, an infringer, challenges the originality of the work. We know now what the author has to do to sustain his claim of authorship. The fact that he testifies that he created it himself is sufficient. I am afraid, if we get into requiring that it be a creation, and an independent creation, and not copied from another source, and put that into the statute that there may be imputed requirements by the courts--requirements that come close to the novelty requirement in patents. Now in the field of patents, many competent authorities feel that the test there should be more nearly the test used in copyright--that, with more advanced science, it is desirable to reconsider what the proper test of patentability should be.

KAMINSTEIN. Don't you think that the words "who did not copy it from another source" reinforce that point of view, rather than look the other way?

FINKELSTEIN. Well, do we need that? All the decisions say that if you create something, as Learned Hand said in one of the cases, although it's the same as Keats' "Ode On A Grecian Urn," if you create that independently you have a copyright in it; but, if you copy it from Keats you don't have a copyright. The burden is on the defendant to come in and show that you copied it from another source. The plaintiff comes in with his work, and he has a copyright in it; we rely on the presumption in the certificate of copyright registration, which we hope will continue, and that establishes the plaintiff's prima facie case.

I'm afraid that if you put these things in the statute, many of which you now find in the decisions, the burden of proof in a copyright case would actually be put on the plaintiff. This would be true even if the action were against a pirate, against somebody who just takes your precise work; he doesn't go to an original, which he claims you took it from, and the author may never have known of this claimed original. In actions against pirates this might create a new hurdle that the statute ought not to impose.

KAMINSTEIN. Well, I know of no one here who has suggested a test of novelty in copyright. Mr. Jackson, and then Mr. Kaye and Mr. Nimmer.

JACKSON. I subscribe to Mr. Finkelstein's view that originality should be deleted. However, I want to pursue a little further the question which Mr. Goldman discussed briefly concerning the decision not to use the phrase "all the writings of an author." The reason, as I understood it, was that we did not want to exhaust the powers of Congress in this respect and make available protection to everything which the Constitution would authorize. I wondered what the reasons were for not wanting to do so.

GOLDMAN. I think there are probably some here who are not yet ready to say that the copyright law should cover the entire field of sound recordings. There may be some who are not yet ready to say that the copyright law should cover the entire field of ornamental design. I think there are some here who are not yet ready to say that the copyright law should cover all the contents of all broadcasts.

Conceivably, these things could be considered the "writings of authors." With regard to recorded renditions of performers, for example, the Second Circuit Court, as we all know, has said that these are "writings of authors" within the meaning of the Constitution. I doubt whether we are all prepared to say that the copyright law should extend to them without more ado, simply by saying that the copyright law covers everything that a court might later find is within the scope of the Constitutional provision. That, I would say, is chiefly the reason.

KAYE. It seems to me that we can't rely wholly on the existing decisions if we change the law. What I have to say is more in the nature of question than of comment. For instance, I notice that with respect to nondramatic literary works we say that they can be expressed in "words, numbers, or symbols," and we limit this to nondramatic literary works and don't make it apply to dramatic or choreographic works. I wondered if that was the intention, and I wondered whether any language which describes the means of expression should not be generally applicable.

And I also wondered whether that language shouldn't include what seems to me to be essential--that the means of expression should be capable of intelligently communicating the work. I don't know quite what "represent" means, but it seems to me that the essence should be communication--at least capability of communication to someone who has learned the opposite language.

I am sympathetic also with the desire to make the scope of the copyright law exclusionary as well as inclusive, and yet I wonder whether this language doesn't include some things that the Report intended to exclude. For instance, it seems to me that a completed building is a three-dimensional work of applied art. Yet I think we intended to exclude buildings, as distinct from their plans, from copyright protection. And there are other respects in which I think this is unduly inclusionary.

With respect to the definition of authorship, I am troubled by it because it seems to me in some respects to be too narrow and in some too broad. For instance, we don't intend to say that a person who attempts slavishly to copy a painting, say the "Mona Lisa," should be denied protection for those features of his copy which may in actuality differ from the original. And yet when I look further at the section I see that the mere result of the selection of material may create authorship. If someone who copies the Bible and leaves out the "begat" chapters is an author, then it seems to me to demonstrate that authorship by omission is too extreme a concept. So I still have some struggling to do.

KAMINSTEIN. And so do we. Mr. Nimmer, then Mr. Abeles, and then Mr. Schiffer.

NIMMER. Back to Mr. Finkelstein's first comment, with reference to whether or not the concept of originality should be contained in the Act, and, if so, whether this is an adequate statement of that concept. On the first point I would differ with Mr. Finkelstein. I think that it is a good idea to have a statement of the requirement of originality in the Act. It is true that we've gotten along these many years without such a statement and no great horrible results have ensued. On the other hand, it would seem very likely that many people not too familiar with copyright law are misled on merely reading the Act into thinking that originality is not a necessary concept--or that they possibly also might assume that novelty rather than originality is what is required.

So it seems to me that it is a good idea to have an express statement of the requirement of originality in the Act.

As to the adequacy of this particular statement, on the whole it seems acceptable to me. But I do think that Mr. Finkelstein has a good point when he bears down on the word "creation" in that definition, which conceivably could lead to confusion. At this point I get to the fine line between substantive remarks and technical remarks, which were enjoined, but I would just like to throw out that the word "product" rather than the word "creation" might satisfy that concern.

ABELES. In the first copyright infringement case that I ever had, Fisher v. Dillingham, in which I represented the plaintiff, I pointed out to Judge Hand that there was a distinction between a copyright and a patent--that in a copyright case you only had to establish originality, while in patent cases you had to establish novelty--and he agreed with me. Therefore, even though the "Dardanella" bass, note for note, figure for figure, was the same as in a prior work, the "Mermaid Song" from "Oberon," he held for me that as it was not shown the "Mermaid" song was the source of the "Dardanella" bass, it must be deemed to be original.

In a subsequent case, Darrell v. Joe Morris Music Company, I represented the defendant before Judge Mandelbaum. I put in evidence prior examples of the same musical sequence that appeared in the plaintiff's work and in the defendant's work. Judge Mandelbaum in his opinion said that, as I had shown by prior examples the plaintiff's work was not original, judgment should be for the defendant. However, I corrected that by submitting findings, in which I provided that, as there were prior examples of the same sequence, you could not say that the defendant took it from the plaintiff instead of from one of the prior works. The Appellate Court sustained my argument.

I am very much concerned with the provision that you can not copy from another source. That may be used as an argument that, if any part of a work is the same as in a prior work, it is not original.

SCHIFFER. I'd like to go back to the question of the omission of the words "writings of an author," and to Mr. Goldman's comments on the matter. It seems to me that the best drafting concept would in fact be one that includes everything except for specific exclusions.

I say that for these reasons. The pressure which we now feel in the area of unfair competition, and in various other borderline areas of state jurisdiction, results directly from the failure of the federal system to be broad enough to cover new developments. Now this will continue, probably at an accelerated pace. If we fail now to get a law which in fact provides for federal pre-emption in the largest possible scope, excluding only those areas which at this time we feel are premature, we will continue to have a lack of uniformity and a variety of new

causes of action and new problems arising--which could be avoided and which, if not avoided, will continue to be expensive.

WHICHER. I wanted to get back to this question of originality. What bothers me in subdivision (b) is not just the word "creation" but also the word "independent." I think that word "independent," as applied either to a "product" or a "creation," can cause trouble and get us back into the concept of novelty again, which I am sure nobody intends, but which all of us--or most of us, I think--are afraid of.

KELLMAN. I believe that, since the Act is intended to cover originality, the statute should have a provision requiring originality, but that the statute must also have a provision reconciling the word "originality" with all the other matters which provide that works which are not wholly original can be copyrighted--as in the case of combinations or arrangements of works in the public domain, and so forth.

KAMINSTEIN. Don't you think that is covered in the next section, or are you thinking of something beyond that?

KELLMAN. I am not happy with the manner in which it is covered now, in the draft.

GOLDBERG. I would like to know whether it is the intention, in using the phrasing "visually or orally perceived," etcetera, in section 1(a), that works which are perceived by other senses are to be excluded--for example, Braille works, or even the "smelly" movies.

KAMINSTEIN. I hope you didn't say the "smelly movies."

GOLDBERG. I did.

KAMINSTEIN. He did! (Laughter)

GOLDBERG. I was merely using the term used by the creators of those works.

KAMINSTEIN. There was no intention of excluding Braille. If you can see the possibility of other senses, or language which would encompass them, I think we'd like to consider that. But we have always considered Braille registrable under the present Act and we would assume that it would be registrable under any new act.

GOLDBERG. Well, under the present Act, I believe there is no requirement of perception "visually or orally."

ROTHENBERG. In line with Mr. Goldberg's suggestion, I would like to recommend that the word "tactilely" be inserted so that it might read "visually, orally, or tactilely perceived," and that it not be limited to Braille, because there are other works of art which you do not necessarily perceive visually.

The example that was mentioned to me is a checkerboard which, when visually perceived, is not original by any means, but the particular cubes are put together with different materials having different textures, so that the artistic genius of the sculptor is only realized by touching the checkerboard, and not by looking at it. And, therefore, I like the word "tactilely," because I'm sure other examples can be thought of.

KAMINSTEIN. In view of the long arguments on design, we would welcome written reactions to that proposal, rather than going into any lengthy discussion of it.

SCHULMAN. I think that the discussion so far has indicated the danger of trying to be too precise. For example, as one reads subdivision (a), numerous instances of works which are fixed in a form from which they can be reproduced come to mind, and if we're just going to put in an additional word such as "tactilely" to take care of Braille, we'll leave out anything else.

I think, for instance, of the electronic storage devices in which information is stored. I don't know whether in that form it can be "visually or orally perceived." I don't know whether in that form it can be "reproduced" exactly as stated in this subdivision (a).

It seems to me that, when a work is fixed, not necessarily in "tangible" form --"tangible" indicates something material--but in a form from which it can be reproduced, we have the essential of a copyrightable work. And the very fact that it is not "tangible" in the sense that one can touch and feel it or tear it up, or in a form which can be perceived merely through the physical senses, I think demonstrates the difficulty in trying to prepare a rigid statute. I think the broader we make the statute the better off we'll be in taking care of developments in the future.

You see, we come to the same difficulty in dealing with the subdivisions. I think Sydney Kaye's discussion is excellent, because they refer to certain works described in terms of "words, numbers, or symbols." We have choreographic works described in terms of preparation "for presentation to an audience." Now, the choreographic work which is prepared for educational purposes--for teaching, for example--would not be covered by subdivision (3). One might prepare a choreographic work, not necessarily for presentation, but for discussion, for teaching; and it seems to me that copyright protection should not be limited only to those works which are prepared for entertainment purposes.

I think our difficulty lies in the fact that we are trying to write contracts rather than a statute. We are trying to express, in precise terms, all those things which we can possibly think of today, rather than thinking in terms of a statute which may cover developments over a period of years.

NIMMER. First, parenthetically, a brief final word from me on originality. It does seem to me that the word "independent" is the very essence of originality, and does not suggest novelty.

Two other points on the substantive aspects of this enumeration. Number one: I would like to join with Mr. Schulman in feeling that "prepared for presentation to an audience" should be deleted from the "choreographic works and pantomimes." It seems to me that, if the intent there was to avoid casual infringements of works that were not seriously intended for commercial or other serious use, that consideration is met, first of all, by the requirement that the work be reduced to tangible form. And, of course, on that there is the underlying constitutional requirement which I think, by implication, requires tangible form.

More than that, it seems to me the way to meet that is in terms of the rights to be commanded by the choreographic work. That is to say, only a public performance, or a public performance for profit, of such a choreographic work should be regarded as an infringement--not merely a private performance. It seems to me that that would be met there, and that "prepared for presentation to an audience" would give rise to unfortunate difficulties--something of the sort that we have now in scripts.

One other brief comment, and that concerns the category of dramatico-musical works. It is my opinion that this is an odd category that should not be continued. I think that the problems inherent in, or suggested by, this concept can again be met in the area of rights, rather than in the characterization of the type of work to be protected. In other words, you have dramatic works, and you have musical works. To the extent that there is an integration of a musical work in a dramatic work, and special rights are to be commanded by such a musical work (or a musical work in that form), this can be recognized in the area of the rights to be commanded, rather than in attempting a categorization that I think has created difficulty for the courts in the past.

DERENBERG. I have a question about number (5). Was it intentional that, at the end, you say "works used in advertising or in labels"? That seems to narrow the existing law. Doesn't it protect, under copyright, all commercial advertisements or labels other than trademarks?

I don't quite understand why we say "works used in advertising or in labels." Perhaps you should go back to the existing language, and simply add a category of "commercial advertisements or labels."

KAMINSTEIN. It seemed a little odd to us to put that into a separate category. There was no intention of narrowing the field.

DERENBERG. I read that as limitative when you say "works used in..." That does not cover the entire field.

WATTENBERG. It seems to me that in attempting to particularize, to categorize, we may be falling into the same trap that we did in 1909. In 1909 the framers, in many respects, assumed that life had developed to a point at which it could not continue developing. And they particularized with regard to jukeboxes, and in other respects. They had no foresight to see that years hence there would be many new things, many forms, many devices, and they had no general provisions which would encompass these developments.

Now, are we doing the same thing here? You have listed seven categories. I can't tell what we will have, ten years from now, which will not fit into any of these categories. What provision have we made to protect these new developments?

FINKELSTEIN. It seems to me that, if you have these separate classifications, you probably have a purpose in doing it. I imagine that you expect to have particular requirements for limitations on rights assigned to each of these categories later.

Yet, I can't see why some things fit within a given class and others find themselves separated. For example, if we look at (5), we find that works of fine art are put in the same class as prints and labels for advertising purposes. They'd be in number (5). You don't use the word "prints." The old law does, but I assume that there was no intention to exclude prints. And I can't see how those two things can be put in the same class for any purpose.

And then, by the same token or the converse of it, I think we've gotten to the point where there should be no separation as between musical works, and dramatic works or dramatico-musical works. Back in 1909, the ordinary popular song had a terrific market in the sales of sheet music, and a dramatic work had no market whatsoever in terms of sales of books or plays. Today we find that popular music has no market whatsoever--no market to speak of, certainly--in the sales of sheet music, that the only commercial avenue for any kind of musical work is in the performance. And I suppose there is a little bit of a market in paperbacks for dramatic works--certainly a greater market than there was in 1909. So we find the two situations reversed.

But I think primarily, in all these fields, we find that, with modern scientific equipment, the great market for music or for plays is in the performance. They both have the same market today. It would seem to me that they should be in the same class. I rather think that we'd be better off if we didn't separate all these works into separate classes. Put them all into one class and then later, if we want to have limitations on the rights, put those limitations in a limitation section; and then put your classifications there, because you're going to have your limitations there.

GOLDMAN. I'd like to ask Herman a question, to see if I understood. Are you suggesting that we simply cut out the numbers, and run whatever categories we're going to list all in one long sentence, with commas, or semicolons, or something between them? Is that all you had in mind?

FINKELSTEIN. I have some fear, seeing it this way, where works are separately classified or works are lumped together in the same class. When you do it this way you have numerical classifications rather than a single paragraph with semicolons in between. And I think if you use the semicolons you'd have fewer words--which I think is always good draftsmanship. But when you have all these classes, and you put given things into certain classes and then separate one thing from another thing by giving it a different class, you're going to end up--either in the statute in your later drafting, or in interpretations by the courts--according different rights merely because works fall in different classes.

GOLDMAN. Is that all you're suggesting?

FINKELSTEIN. That's right.

GOLDMAN. Eliminate the numbers, and just run the thing through the text with semicolons between?

FINKELSTEIN. I think that if you do that you will have fewer words and a better act.

BURTON. I think there are two fundamental points that have been developed thus far. On the basic philosophy, expressed by Mr. Goldman, with respect to the spelling out of the subject matter of copyright, I find myself in complete accord. I think that, in our society generally, members of Congress and the interested public have a right at this point in our development to know what the subjects of protection are. I also think that the granting of different rights, or even conceivably different remedies, to different subjects, is an admirable objective.

I think that to go before the country and say we are going to protect everything that Congress ultimately could protect constitutionally will defeat what actually is our basic purpose. If there be groups or interests who say that a particular category has been excluded from this list, then let such group be heard. I certainly find myself in accord completely with that philosophy of draftsmanship.

Now, with respect to the point raised by Mr. Finkelstein, I think that there are two approaches. One certainly is the one that he has suggested. There is one which is rather diametrically at the opposite end of the spectrum, and I can see some merit in it, and that is a further splintering of numbers of subject matters.

I would take fine art for example, if that be a good example, and make that into a separate category. You may very well want to grant greater rights with respect to works of fine art than you may wish to grant with respect to the so-called "Mazer v. Stein" area.

So, although I think you could adopt Mr. Finkelstein's approach, and I think there is room for much argument as to the particular phraseology of these categories, I think that comes within the Chairman's injunction at this point. But I think that, as a philosophy, I should undoubtedly prefer: (1) to adopt Mr. Goldman's basic approach, and (2) to have more specifications rather than less.

LINDEN. My attention was drawn to the last sentence in (a) which reads, "The subject matter of copyright shall include the following categories of works:..." The phrase "shall include," as I read it--(and I would like your help with construction, in that regard)--means that the categories listed were by way of illustration rather than by way of limitation.

My next question concerns the categories which are specifically listed and which are further limited and characterized by the language adorning the various classifications of works protected in sub-numbers (1) through (7). I'd like a little clarification on that. Is that accurate in view of the use of the words "shall include," or was it the intention of the drafters to limit copyright protection to specific categories?

GOLDMAN. I think "shall include" implies that the listing here is not necessarily exhaustive, and that this was meant to be a broad, general specification, with categories that indicated the kinds of works to be included, but that it didn't necessarily mean that something had to fit precisely into one of these categories to be included.

With respect to the phrase--I think this is what you're questioning--"including works expressed in words, numbers, and so on," instead of just saying "nondramatic literary works..."

LINDEN. That's right...

GOLDMAN. If we just said "nondramatic literary works," I think it's very likely somebody would say "Well, the present law says 'books, periodicals, lectures.' Are all these things included in nondramatic literary works"? I think you remove any doubt if you say that anything that's expressed in words, or numbers, or symbols, is included in "nondramatic literary works." So we don't have to spell out all the various forms of nondramatic literary works to explain what is meant.

LINDEN. Then these again are not words of limitation, but words of illustration. Is that correct?

GOLDMAN. I think that's true.

KARP. I should have preferred to adhere to the present provision of the law which puts copyright on "all writings of an author." That's the form that the Shotwell Bill followed, and that other drafts have followed in the past. And I was a bit puzzled by what seemed to be Mr. Goldman's analysis of the objections to that. As I understood him, he said, first of all, that "writings of an author" is such a broad term that it might include works which were not intended, or Congress didn't wish, to put under copyright. Now, as for that, I can't see how "work of authorship" is any less broad a phrase than "writings of an author." If your concern is to limit or exclude some types of works, you haven't accomplished it by saying "work of authorship" any more than you've accomplished it by saying "writings of an author."

Secondly, I had the same problem that Miss Linden had with your listing. If it is only by way of illustration, I hope that the draft will either say so or that some comment accompanying the Report that would later be included in a Congressional Committee Report would say so, because this can be read the other way. In fact, if the objective is as Mr. Goldman said, what would be the point of all this?

Now, the last comment I would like to make concerns this definition of originality. And, again, I get back to my basic premise that I think we'd be much better off to adhere to the phrase "writings of an author"--which has an established meaning, which has been defined by precedent and prior decision, which has that degree of flexibility which we need, and which avoids the pitfalls of over-definition--because I'd find it difficult to explain to a court or try to rationalize a

definition which takes into account "independent" and the next qualification "did not copy it from another source." Now, what's the difference between "independent" and "did not copy it from another source"? And if there is no difference, why did you so phrase it? I think this is the trouble you get into when you start defining or redefining a full concept, the "writings of an author," that already has a well-established meaning.

SCHIFFER. While I agree with the general tenor of what Mr. Karp has been saying, we do have the problem that actually the omission of categories is going inevitably to create litigation when people try to say that something is not intended to be covered which is now covered. Now the phraseology, as I read it, and as it strikes me in this present draft, would have a great danger of being interpreted as words of limitation unless it's greatly clarified. Actually we get immediately into the constitutional word "writings" in defining such things as words, numbers, or symbols.

My own view on this has been that the term should be and is broad enough to cover any form in which work can be preserved, which would include, for example, electronic cores, memory cores in computers. But when you use "words, numbers, or symbols"--and I don't want to get into the specifics, but to use this as a general example--you immediately create a court interpretation problem with this use of language on the question of whether a device not now conceived is in fact a "symbol" within the meaning of this concept, or whether what was intended here was merely the type of symbol which was used in 1909. In other words, we'll be back to the same problem as that in White-Smith v. Apollo in that sense.

I believe that, as this stands now, we do have that problem, and that the only way to avoid it will be to use general language which spells out the broadest possible intention, and delimit bare categories, such as "nondramatic literary works," "periodicals," and so forth, and list them without any kind of characterization.

SARGOY. I should like to associate myself with the views of Messrs. Schulman, Finkelstein, Kaye, Whicher, Karp, and a number of others here today. I would feel that the other senses, too, should have been taken into consideration, as mentioned here--both the tactile and the olfactory senses--and not limit it to the visual and auditory.

One of the difficulties here, too, is that, I think, we should try to be consistent in the use of language. In subdivision (4), for example, you have "nondramatic musical works, with or without words." In (6) you have "motion pictures, including accompanying sound." Now, the way those are phrased, I think the court would be inclined to think there are different meanings. I think really the same thing was meant; "nondramatic musical works, with or without words," and "motion pictures,

with or without accompanying sound," is really what was intended, I think, in both instances. That, I think, will indicate the desirability of being consistent and using the same type of language, particularly in the same sections.

I am also troubled by that definition of "original." I think there's an element of redundancy in what it says. I think when the word "originality" or "original" was used by the courts in the older days, they really meant that which is protectible, that which originated with the author and not with somebody else, his own contribution which originated with him--that is, which he didn't copy or take from somebody else.

As to the scope of the subject matter, if it is the intention to be broader than the seven categories, should such commonly used words as are often used in contracts, "including but not limited to," be put into the statute?

Again, in subdivision (1), where you have qualifying expressions such as "including works expressed in words, numbers, or symbols," there are other classes of works that are expressed in those. In the case of choreographic works, I understand one of the basic methods is to express them in symbols. Yet that's not included in subdivision (3). Musical works are expressed in symbols. No mention of that is made in number (4)--although I believe, under the proposed new act, you need not necessarily express the musical works in symbols; if you don't know the symbols for the music, you can sing your song onto a recording, or play it and have it recorded, and still be protected in your work. So, here again, there is the use of phrases that are placed into one subdivision and not made applicable to other subdivisions.

GOLDBERG. We have another example of the general problem of inclusion and exclusion. Page 13 of the Register's Report says: "We do not believe, however, that it would be appropriate to extend the copyright law to industrial designs as such." It's not clear to me how this position is reflected in the draft of section 1.

The second comment that I have, which is perhaps slightly contradictory, is that perhaps we can make sure that the categories of works which are presently covered will continue to be covered under the new act by stating something to the effect that it is not the intent of the new statute that the categories covered under the present statute are to be deprived of protection.

KAMINSTEIN. I would assume that, as a matter of legislative draftsmanship, Congress might object to such a statement. I think it is perfectly appropriate in a report, which says you don't intend to limit the scope.

TANNENBAUM. I think Mrs. Linden's objection might be overcome by recasting the last sentence under subdivision (a) so as to read as follows: "The subject matter of copyright shall include but not be limited to the following categories of works:..."

May I also ask why would you not include such important works by specific language referring to them as "books" and "periodicals"? While they may be included generally under "nondramatic literary works," why go into detail with respect to others, and leave out the vast field of stories, books, and periodicals? It might be advisable to enumerate the works under any one of subsections (1) to (7), or add an additional subsection specifying the works.

GOLDMAN. Mr. Tannenbaum's last question indicates why we thought, if we stopped at "nondramatic literary works," without saying "including works expressed in words," etc., we were going to get this very kind of question. We thought that books were clearly "works expressed in words, numbers, or symbols." Incidentally, the word "book" refers to the physical form and not to the work. We also have books of music, books of pictures, etc.

Some of the other discussion also indicates what I think is a similar confusion between what's covered by the first sentence and what's covered by the enumeration. That is, the first sentence is talking about the form in which the work is fixed, and it covers various forms. So when people say that they don't know whether a work, which is enumerated in items (1) to (7), is going to be covered if it happens to be put in a machine where you can't read words--or where the machine is going to reproduce words, let's say--they are talking about the form in which the work is fixed, and not the nature of the work itself. The work in the machine will be a nondramatic literary work, let's say, or perhaps a musical work. It's not going to be the machine itself which is the work, and it's not going to be the tubes or any part of the machine that is the literary work. It's going to be the words, the text, or the music, etc., placed in it. So I think we have to bear in mind that we are talking first about the form in which it is placed, and that the enumeration does not attempt to list all possible forms. It would be ridiculous to try to.

The first sentence refers to form, and includes, I think, practically every kind of form in which the work could be placed. The second refers to the character of the work. A book may be an example of a form rather than of a work. And I think maybe that explains why we don't say, in the enumeration, "books." We say "literary works," or "musical works," or "pictorial works." Any of these could be in the form of books. A book is certainly included in the first sentence as one of the possible forms.

SCHULMAN. I don't want to impose myself too often on the meeting, but it seems to me that we're not here to do actual drafting but to get basic principles established. I think that the debate, so far, has indicated that there is no difficulty with over-particularization.

I am particularly troubled, however, at the question raised by Mrs. Linden and the answer by Mr. Goldman, especially in view of his original statement. When I first read this subdivision, I arrived at the same conclusion that Mrs. Linden had--that the enumeration was merely by way of illustration or example, rather than by way of limitation. We intended to do that in the first section of the Universal Copyright Convention and had no problem.

On the other hand, after reading this wording several times, I reached the conclusion that a court, looking at it, might apply the rule of inclusion and exclusion--namely, that the things which were included so specifically eliminated all things which were not included. And that was fortified by Mr. Goldman's statement this morning, that it was not the purpose of the act to include everything which would come within the category of "the writings of an author."

Now we can't be ambiguous. We must make up our minds. I think that one thing we should decide here is the question whether the phrasing of the statute should be such that there is an enumeration of the kind of works to be protected, thereby excluding those not enumerated generally or specifically, or whether we intend to have the broadest possible definition of "writings of an author" and merely give guidance to the court by way of illustrative language.

For example, I am troubled if we go into detail about the difference between a nondramatic musical work and a dramatico-musical work. What is the song "Lizzie Borden"? Is that a dramatico-musical work or a nondramatic musical work? Or "Sweet Alice Ben Bolt," which tells the whole story; is that a dramatic or nondramatic musical work? I think we must get into these difficulties if we try to particularize too much.

For example, I have written opinions saying that a teletape recording was not a motion picture, because a motion picture is something that has frames and characteristics of that sort; it can be seen by projection of light. I know that some of my friends disagree with me. But I can say that there would be an argument, under the presently suggested language, whether we intended to cover as motion pictures pre-recorded television programs which appear on teletape--which are not, in my opinion, technically motion pictures.

So I think we ought to make the first decision, namely, whether we want a broad coverage and make it clear that anything else is merely by way of illustration, or whether we are creating categories excluding all those types of works which are not embraced within the specified categories.

WASSERSTROM. I'm puzzled by one thing. Mr. Goldman has said that the enumeration was not exhaustive. I think that's so, because I think the word "include" does not necessarily imply that only those things that are enumerated are involved. I take it you would have said "...shall consist of the following categories," and not used the word "include," had you wished to exhaust the matter.

But if the enumeration is non-exhaustive then we are thrown back, in order to determine the range of subject matter, to "an original work of authorship." And doesn't this present a serious and critical constitutional question, because isn't it possible that the phrase "an original work of authorship" indicates range and scope, broader than a "writing" unless you construe "authorship" as necessarily limited to "writings"? But if it isn't so limited, then constitutionally Congress would be overpassing its powers, because it may only legislate in respect of "writings." Would you explain that, Abe, please?

GOLDMAN. Well, as we understand the word "writings," we think that it is satisfied by the requirement that the work be fixed in a tangible medium of expression. If "writings" mean something more than that, I think the whole copyright law is in trouble.

WASSERSTROM. Well, everything that is in a tangible medium is not necessarily a "writing." Is your position that anything and everything that is in such tangible medium is a "writing," constitutionally?

GOLDMAN. It has to be the writing "of an author," too. But with respect to "writing," yes.

DERENBERG. I would say that I would agree with what John Schulman just said about having broader coverage. I forgot to mention one specific point when referring to subdivision (5). For the last eighty-five years or so your office and the bar have been concerned with one specific limitation that appears here, that limits commercial advertisements to "merchandise." That certainly should disappear. Either we should say "merchandise or services," or we should eliminate it altogether. There is no reason why a beautiful advertisement for a service by a bank, or insurance company, or whatever else it may be, should not have copyright protection. And we have been troubled by this limitation to merchandise before, as you know.

KAMINSTEIN. Well, as you know, we do register those now, so that we would intend to include them in the ...

DERENBERG. You could just add "or services."

GOLDMAN. I take it, Walter, you're not referring now to labels. You're referring to the advertisements.

DERENBERG. Yes.

GOLDMAN. And your point would be taken care of if it were clear, as maybe it isn't, that "for merchandise" modifies "labels" but does not modify "advertising."

NIMMER. With respect to the point originally raised by Mrs. Linden and commented upon by others, initially I had made the contrary assumption. That is to say, nothwithstanding the word "include," I assumed you meant "include and limited to," and I was going to raise it later when we get to technical words. But when you say that it's by way of illustration only, then I must agree that this leaves us completely at sea.

I'm not concerned so much with the constitutional aspect because, in my opinion, "original works of authorship fixed in any tangible medium" do constitute "writings"--although it still might be better to say "writings" if that's what we mean. (But if we say that, then we have to be careful that we say "writings in the constitutional sense" as distinguished from "writings as construed under the present statute.") I think the important thing is, if the thought is to have this only by way of illustration, we have to have some more meaningful overall category. What is open? Either the constitutional sense of "writings," or the statutory sense of "writings" (but apparently we don't mean that, because we are including sound recordings), or some other more carefully defined overall phrase.

I think this is an important defect, a substantive defect in the present draft. My own feeling is that we should say that it includes "writings" as this term was used in Article 1, Clause 8 (or whatever), of the Constitution, subject to whatever specific exclusions we want to make.

GOLDMAN. As to specific exclusions, this point was made before by Mr. Schiffer. It seems to me that what everybody is talking about is, "Let's leave this open to take care of things we cannot now foresee." I don't know how to exclude what I can't foresee.

MANGES. When a copyright statute is drafted, it seems to me that the first thing the public and the courts are entitled to know is what is copyrightable, not illustrations of what might be thought copyrightable. When you start out by just giving illustrations, I think you are just encouraging a guessing contest as to what items or categories might be copyrightable but are not set forth. Therefore, I would be in favor of changing "include the following categories" to "consist of the following categories."

I'm not inclined to criticize the oldtimers for a lack of clairvoyance. I don't think that we today can be any more farseeing than they were at that time. I think when inventions produce new categories then we've got to adapt the law accordingly, by way of amendments. I think that clarity in the law is more important than all-inclusiveness where you're merely setting forth examples.

BRYLAWSKI. My neighbor here is conveying the same thought that was in my mind. In the 1909 Act there is a provision that the subject of copyright shall include "all of the writings of authors," and then the Act proceeds to list the categories. But those categories omitted the unpublished nondramatic works of authors. Everybody agreed that it was the intention of Congress to grant protection to the unpublished nondramatic works of authors, such as a thesis that a student might write for his Doctorate degree, or any serious work. But unfortunately there was no category in which they could be covered, and the Copyright Office has no forms or applications for registering them.

Now, we're going to fall into that same trap, because, unless the category is very definite, so you can say that this work will go in such-and-such a category, we're going to be in the same position--that there will be a work which is not covered by the categories set forth here, and there will be no provision for making registration of the claim--exactly as we are facing under the present law.

So I think the statute should say that the category "shall apply to the following works," and not just "shall include"--that it should be limited. The works which could be covered by copyright should be definitely set forth, and none others included by implication.

GOLDMAN. I think the example you give doesn't illustrate perhaps what you have in mind, Fulton. You're talking about unpublished nondramatic literary works, that is, unpublished book material. The reason it's not now registrable is not because the statute doesn't cover books or book material. It's because the statute covers published works, plus certain limited and specified categories of unpublished works.

Now, bear in mind there's one other thing about the present law. In addition to "all the writings of an author" in section 4--that very general phrase--and then an enumeration in section 5 (and that enumeration, remember, is made for the purposes of classification for registration)--there is then the phrase that says, in effect, "This enumeration shall not be deemed to be exhaustive."

BRYLAWSKI. But the fact remains that for all these years these things have not been registrable.

GOLDMAN. That's right, but not because of a lack of categories.

One other thing. Remember that this enumeration does not represent a classification for purposes of registration. In our Report we indicated that that was to be entirely different and separate from the specification of copyrightable materials. We recommended, and I thought everybody agreed, that classification for purposes of registration is something that would be a matter for administrative regulation, and it's not in this part of the law at all.

KAMINSTEIN. It is just a minute before 11:30 and I would like to ask you to shorten your remarks and close the discussion on this part, so that we can take it under further consideration and go on to the next.

COLBY. I'd like to direct attention to two aspects of section 1(b). I note that it is phrased in the singular, whereas a motion picture may consist of many parts. This may be a matter of drafting, but I would raise it now for future consideration.

Secondly, as to the part of the phrase which reads "who did not copy it from another source." Motion pictures, and compilations of books, and so on, may include exact reproductions with permission--for example, stock footage film, or reproduction of a part of an article. And I do not find too much comfort in section 2(d) on a derivative work because it refers to "recasting" or "transforming," when in fact what I speak of may be five minutes for a larger work of an hour and a half, or a small part of a book. This may be a drafting matter, but I'd like to raise it at this time.

GOLDMAN. I think when we get to section 2, as we will shortly, you will discover it not only covers new versions as such. It also covers new material used together with old material. Maybe that takes care of your question.

BURTON. Briefly, finding myself on the "pro-category" side of this argument, I would suggest the re-reading of Capitol v. Mercury--because the present act, with its broad inclusive language, didn't do much good in Capitol v. Mercury. The more you read Judge Hand's opinion, the more you come to the conclusion that in his mind was the fact that the courts wanted Congress to act. And it didn't do the people who believed that kind of work should be protected much good to have a court say "Congress could have done it but it didn't do it." I think that case bears careful reading in support of specifying categories.

WATTENBERG. I have a proposal to compromise this dilemma. On the third line you say "now known or later developed." Now, I don't say that the seven categories are exhaustive, but if we say "the subject matter of copyright shall be limited to the following categories of works now known, but shall also include works later developed," in this way we can say where we are today without limiting the future.

KAMINSTEIN. I would like to ask you to consider briefly the question that Mr. Burton just referred to--that is, the line we have inserted on sound recordings. Does anyone have any comments? I'd like to pick up that question, on the understanding that we do not want to discuss the rights to be given, and that we would prefer to have a much more complete discussion when we discuss rights. This provision in section 1 would just bring it into the statute, and that's the only question that we want to raise at this point.

SARGOY. I haven't been inclined to rely on the courts for the ancient definitions of words such as "publication," or the White-Smith v. Apollo concept of what is "copying." But I think, in this instance, where we have come to a word such as "writings," as put into the Constitution in the Eighteenth Century, or the word "author," I think the courts have done a pretty good job--as they did also in both the dissenting and majority opinions in the Capitol Records case. I think here I would be inclined to rely upon the courts and just say "for a work of authorship"--which means a work originating with the author to the extent of what he contributes, which has not been copied from other sources. Even though he is working on public domain materials, he might have contributed something of his own authorship which originated with him and which will be protected.

When you use the word "original," newer concepts, newer questions come in which do not exist under present law. I think the courts could very well take care of this, and if it is broadened to the extent of saying that sound recordings might come within the scope of copyrightability, then in other provisions of the Act you can define to what extent, if any, you are going to give protection to certain aspects of sound recordings--such as, perhaps, the interpretive rendition or otherwise. That can be well controlled in other parts of the law, but I think here we would do better to take out a definition of "originality" or the use of the word "original" and rely just upon "a work of authorship," as the courts have been determining that question.

FINKELSTEIN. I just have a question on (7). Do you mean sound recordings of original works of authorship, or do you mean that sound recordings shall be considered original works of authorship per se?

GOLDMAN. What we're saying is that sound recordings themselves will be considered original works of authorship. Bear in mind that we are not saying now to what extent they will be given rights, who will own the rights, what the conditions will be, etcetera, but that sound recordings are subject to protection--whatever the protection may be--under the copyright law as works of authorship.

FINKELSTEIN. Even though they may not be independent or creations of authors, or even though they may be taken from another source.

GOLDMAN. That goes to everything in here, including the other six categories as well as sound recordings.

KAMINSTEIN. We're not trying to raise sound recordings above...

GOLDMAN. They must be original works of authorship.

KAMINSTEIN. They must meet the other qualifications.

GOLDMAN. Of course.

FINKELSTEIN. I just wonder whether the definition of "a work of authorship," as you have it, isn't put in there only for the purpose of limiting sound recordings. It's wholly unnecessary, it seems to me.

GOLDMAN. Not at all. It relates to everything, all of the categories.

DUBIN. You mean the mere mechanical acts of recording will be deemed to be a work of authorship?

GOLDMAN. It will be, in much the same way as the mere mechanical act of photographing a motion picture.

DUBIN. I am concerned about the physical act rather than what is contained in the recording.

GOLDMAN. Well, this would cover the recording, meaning what's contained in the recording, of course.

DUBIN. Well then, why didn't you say so?

GOLDMAN. A blank platter, no. A tape in which the material has been erased, no.

DUBIN. Well, I suppose that would be covered by a later discussion.

GOLDMAN. No. That would not be a sound recording.

DUBIN. What is the protection given? Is it given to the act of recording, or what is the nature of the...?

GOLDMAN. It's given to the product of recording, not the act of recording.

LICHTENWANGER. Bill Lichtenwanger, Music Division. I just want to say that we are happy to find ourselves in this august company after 44 or 45 years. I know you don't want to get into the question of what is protected at this time, but it's certainly not a mere mechanical matter. It is a matter of the artistry that is contributed to the recording. I'm sure this will be discussed later on, but that's the important thing as far as we're concerned.

I'd like to talk to this word "tangible" in the second line on the page. That's something that bothers me, and not just in connection with music--although I can conceive of a computer set up to produce sound, which might be wired directly to the head of a deaf person; there would be no sound in the ordinary sense, but it would produce a work of authorship which would be appreciated. Take the smelly movies; that's another case where you might have an original work of authorship, and yet there would be nothing "tangible" in the ordinary sense. I'm not a lawyer, but it seems to me that this word "tangible" is dangerous to use.

KAMINSTEIN. Mr. Evans, did you want to speak?

EVANS. Yes. I wanted to ask Mr. Goldman if it is the act of recording that creates the subject matter of copyright.

GOLDMAN. It's the product of the act of recording.

EVANS. The product. That is to say, a record containing bird calls or sound effects would be a subject of copyright.

GOLDMAN. I suppose it might be. If it's an original work of authorship, and I can conceive that this could be so.

EVANS. Thank you.

SCHIFFER. One of the difficulties I have on this sound recording thing is that I don't quite understand what is intended to be covered in category (7) as distinguished from category (4), "nondramatic musical works." It seems to me that we've got what looks to me like three categories of sound recordings--that is, mere performances of other musical works, electronic music, and a mixture (which may be arrangements made in the course of recording or new material that is not mere performance, improvisation by musical instruments which are first embodied

in a recording). Now, the electronic music would seem to me to fit more properly into category (4)--not to be treated, in other words, as a "sound recording" at all.

And with respect to the drafting, the omission of language in terms of "words, numbers, symbols," and so on, in category (4), makes it probable that category (4) would be subject to the same kind of limitation that we have now. In other words, you would treat electronic music as a "sound recording" rather than as a "musical composition" for whatever other implications that may have under the rest of the act. This, I think, is erroneous.

KAMINSTEIN. Would you be satisfied to assume that electronic music was covered by this law if there were no provision for sound recordings?

SCHIFFER. No.

KAMINSTEIN. Well, this is one of the purposes of the clause.

GOLDMAN. I think a good example of a sound recording that is not under paragraph (4) is a recording of a public domain work--Beethoven, on records.

WASSERSTROM. Wouldn't the question that has been raised about tangibility be answered, in a way, by using the word "writings"? I would like to emphasize that. On pain of repetition, it seems to me that, even if I may be mistaken in raising the constitutional question (Mr. Nimmer feels that I am; I don't think so), but putting that aside for the moment, even if there isn't a nice constitutional question, we do have this question of a limitless range of copyrightable subject matter. And I think that we limit the area in a way that we should limit it by using the word "writings" in place of this language.

I take it that Mr. Goldman would say that we would be redundant if we continued to say "the writings of an author fixed in tangible form." I take it to be your understanding that "tangibility" in this context necessarily implies "writings." I don't agree with that implication. I think that would be broader than "writings." I think "writings" in a Constitutional sense should be expressly included in the statute.

ORENSTEIN. I should just like to put to rest the fears I often hear expressed by some of the members here about electronic music. Electronic music has been published and printed in partitur form. It can be copyrighted as a published work.

LEVITAS. Returning to this question of sound recordings for the moment, Mr. Goldman, it seems that either you are back to this "book versus literary work" distinction (where the sound recording would

be in the place of a book, to use your analogy as before) or you're referring to the performance which is on the sound recording (in which event you are really referring here to the protection of performances rather than of the sound recordings--to use your example, Beethoven on a recording).

GOLDMAN. Well, I don't want to answer the question as to who gets the protection--whether it's the performing artist or whether it's the record producer. But we are talking about the recording--as distinct from the music, let's say, that's embodied in the recording.

Now, under the present law, we protect the music; we don't protect the recording per se. This proposes to provide some measure of protection--the lengths of which are not now being defined--to the record per se, which is something in addition to, or beside, the copyright in the music which is embodied in the recording. Now whether it's the performance that represents the creative element or whether it's the production of the record itself that represents the creative element, we are not concerned with here.

SARGOY. Herman Finkelstein seems to imply that, although the Mendelssohn Violin Concerto is a work of authorship, Jascha Heifetz's recorded interpretive rendition of it is not. I would take issue with that view. I think Heifetz's recorded interpretive rendition, the product of his artistic and intellectual labor as put into a tangible medium where it can be preserved, is a work of authorship. Now, whether or not it should be protected is not a question of whether it is a work of authorship. I think that's an economic question to be considered in other places and in connection with other problems.

LINDEN. The last two speakers merely illustrated why some of us here are handicapped at this juncture in considering subsection (7) of paragraph (a). I think that we might be well advised in accepting the Register's initial recommendation that the discussion of this section be tabled until such a time as there is available to us the suggested draft as to the ownership, duration and extent of protection of sound recordings. May I make a motion if it's appropriate at an informal meeting of this kind, that the discussion of this section be tabled for the present?

KAMINSTEIN. Well, without considering it as any formal matter, I would like to urge you to postpone the fuller discussion of this subject matter until we can present what we have in mind on the limited rights, etc., that would be covered--because I think that many of you are really directing your remarks to those questions.

SCHULMAN. Mr. Kaminstein, I think you're right so far as the substance of the right is to be considered; that should be postponed. But I think that we should, at this point, recognize that the problem itself is not quite clear even in section 1.

For example, the problem of recording is not unique in one sense, but has a prototype in the printing business. People have tried to protect "works," when the content of the work was in the public domain, by claiming that their particular format or typography (as in the "Falstaff" case, for example), in itself created a protectible work. And the courts have said that, in the absence of illuminated figures, illuminated letters, chapter headings, and so forth, the mere putting of words on paper in print of a particular type font does not in itself create a protectible work.

I think we've got to look at recordings the same way. We think only of music, but don't forget that more and more works are being recorded on phonograph records, and on tape, which are not music. Books are being read on it, children are getting recordings in school as aids in learning poetry and literature. And we must distinguish between the mere reading of a book or a poem on a record, and a recording of Jascha Heifetz's interpretation of a symphony or a concerto. In other words, the latter may be protected as a creative effort. It may not be an arrangement in terms of notes imprinted on paper, but it may well be treated as an arrangement in terms of notes as they are played and recorded.

For instance, I was always doubtful about the protectibility of a recording. But, in today's era, I think that a compilation, such as a record album or an album of poetry, or something else of that sort, should have the same kind of protection as a compilation in book form. Now, I think you've got to distinguish between the two--namely, the mere recording of a statement in the form of reading poetry and recordings like that, which do not provide any authorship contribution, and something which does add authorship because it provides a new concept.

KAMINSTEIN. I would like to close the discussion despite the additional points I am sure a good many of you have. The only point intended to be raised here was whether sound recordings would be covered by the statute, not these supplementary questions. I would welcome additional written material, or discussion with us afterwards, but I want to turn now to section 2 so that we can at least get started on it this morning.

I am going to call on Barbara Ringer, the Chief of our Examining Division, to talk on section 2.

RINGER. The discussion and recommendations concerning copyright in compilations, derivative works, and works combined with pre-existing material appear on pages 9 and 10 of the Register's Report and, as you will note, are quite brief. Under the present statute, as the Report points out, it is unclear that the elements added to the work

must, in order to support a new copyright, represent "original, creative authorship" in themselves. The only recommendation that the Report made on this point was simply that this requirement be made clear in the statute.

Actually, this recommendation, and the area of problems surrounding it, drew very few comments from Panel members or anyone else. In the most extensive comment it was urged that, if the law make clear that the elements of compilation, adaptation, or added material must constitute original work of authorship in themselves, then it should go further and make clear that "original, creative authorship" can result from a mere arrangement or rearrangement of pre-existing materials.

Attacking the same problem from a different angle, another comment recommended that the new law should also make clear how much revision is necessary to support a new copyright in what's known, loosely, as a "new version." The third comment, which was the only other one we got, suggested that the law be further clarified by specifying that a derivative copyright is subordinate to copyright in any pre-existing material used in the work.

Now, the language of section 2 of the preliminary draft is intended to be complementary to the language of section 1, and I think some of the problems of the interrelationship between the two have already been brought out this morning. What we were trying to do here--in a rather verbose section, I'm afraid--represents an effort to follow the recommendation of the Report and to clarify the language of the present section 7 of the statute, which is the equivalent of this, especially along the lines that were recommended in the three comments that we received. The only departure from the Register's recommendation on this point was to drop the word "creative," for the reasons Mr. Goldman has indicated and which you've already discussed.

Despite the apparent lack of interest or controversy, we believe this is a fundamentally important section. It would be unthinkable to leave it out, even if you could logically defend its omission. Practically all of the copyright laws of the world have sections on this point, and many of them spell out the subject matter being protected in some detail. And, speaking as Chief of the Examining Division, I think the need for a clear statutory provision is demonstrated every day by the problems of interpretation and practice that arise under section 7 in the working out of the present law.

In addition, it is worth noting that this draft, in attempting to draw a clear-cut line between pre-existing material and material that is being added, will have considerable significance with respect to

other problems that we are going to encounter later in the revision, such as ownership, duration, rights, formalities, and so forth. Very serious practical problems arise today in this "new version" area with respect to all of these matters.

I should also like to call attention to three specific points that are involved in the preliminary draft. First, although we loosely refer to this material as "new versions," or "new matter," or "new work," to use the phrase now in section 7, I think that some of the criticisms which have been leveled at the word "new" in this context are well-taken. "New" is a synonym for "novel," and by raising questions of novelty this does add a confusing element. While use of the word "new" here could be defended, we have tried to avoid it. Instead, we have tried to break the subject matter of this section down into three types of works which we feel cover the same ground: (1) compilations; (2) derivative works; and (3) self-contained works added to pre-existing material.

The second point I want to make, which is probably the most important, refers to the second sentence of subsection (a). Under this subsection, a condition of copyright in compilations and derivative works is that the pre-existing material employed in the works be used "lawfully." The word "lawfully" is intended to cover both the usual case in which permission is secured from the copyright owners, and also the less usual case where the work is used lawfully but without permission--and I speak particularly of the compulsory licensing situation.

We have raised this question for the sake of discussion. Under what we have here, a derivative work--an arrangement, let's say--prepared under the compulsory license without the specific permission from the copyright owner, would be considered copyrightable because it would have been prepared "lawfully." This is a question that deserves discussion, although at present I don't think we have any strong convictions about it.

Note that this requirement of using lawfully is not, in terms, applicable to self-contained works added to pre-existing material. Our thought here was that you shouldn't deprive a copyright owner of all of his rights because of the fact that, combined with his self-contained work, is a work which was not used lawfully. Take a song book for example; in the middle of the work are the lyrics of a folk song which, through accident or otherwise, were used without authority. Should this throw the entire work into the public domain?

Our feeling was that the same considerations that apply to compilations and derivative works do not apply in this situation--that certainly that ought to be actionable as an infringement, but it shouldn't throw the entire work, the work that the new author has added, into the public domain. I realize that this is a subject for some debate.

The last point I want to make is simply that sections (c) and (d) could well be put in another section of definitions. We put them in here just for the sake of clarity, although they make the section seem rather long.

KAMINSTEIN. Barbara, I am sure that you haven't discovered the section on which there will be no controversy.

KARP. My first comment is that the more I read this section and the more I read the present section 7, the more enamored I become of the present section 7. It has the virtue of not being verbose, and that is a virtue almost in and of itself.

Secondly, I am very much concerned about this category of "self-contained works" in the section to which Miss Ringer has been addressing herself. I think you ought to have a definition of it, because I don't know what it means. I don't think it means just what you have given by way of illustration--a few words from somebody else's copyrighted work, stuck in the middle of a new and original work like a song book. I think it could also mean somebody's self-contained preface stuck onto a novel.

As now written, this kind of literary hitch-hiking is permitted without the permission of the copyright owner of a novel, play, book, movie or anything else. I see no reason why a man can't make a trailer and tack it onto a motion picture and say, "This is a self-contained work added to a work in which copyright is subsisting, and I don't need the permission of the copyright proprietor of the movie, under this section, to show both." As worded I think that construction could be supported in full.

RINGER. I think you are correct to the extent that the self-contained work can be copyrighted, but the unauthorized use of the work in which copyright is subsisting could still be enjoined as an infringement.

KARP. Also, I do think that, while you are getting into a matter of real substance, it has nothing to do with this section when you get into the area of arrangements under a compulsory license. I won't even bother to argue that; there are plenty of other people who have a greater interest in it. I would prefer, from the point of view of proprietors of copyright in literary and dramatic works, to see the rights of authors protected by the more restricted phrase "by permission of the copyright owner." I don't think that we should get away from a very concise meaningful phrase into something as ambiguous and untested as "used lawfully."

COLBY. With some caution may I take pleasure in agreeing with what Mr. Karp has said. I am troubled by the reduced status of a "new work" to a "derivative work." I appreciate the perhaps dangerous significance of the word "new" as possibly meaning "novel," but it hasn't meant that in section 7. And, as I read subdivision (d), a "derivative work" may be something of a lesser category than a copyrightable work. I realize that we can't look at the end of the book to see how it comes out, but we'll have to see what these rights are and what the reduced status is, if any. I would prefer a phrase such as "separately copyrightable," if we can't use the word "new." But I do confess that I think section 7 probably has worked pretty well.

KAMINSTEIN. We will hear four more and then stop for the morning. Mr. Tannenbaum first, and then Mr. Kaye, Mr. Schiffer, and Mr. Nimmer.

TANNENBAUM. I address myself to the last sentence of section 2(a). Aren't we really encroaching upon the judicial function here, and not sticking to the legislative? Here we are explaining how to determine whether a work is available or not, or whether it's lawful or not. We're trying to define something which the court itself has jurisdiction over.

I think the same criticism applies to subdivision (b). After all, it's self-evident that a person cannot obtain protection for something he unlawfully secured. Therefore, is it necessary to state that in a statute? I mean, that is so self-evident.

RINGER. Well, no, I don't feel that it is self-evident at all, and the present law does contain the same provision, sort of tucked in in an ambiguous way.

TANNENBAUM. In that respect, I think the legislative drafting of the 1909 Act is open to a great deal of criticism. Those who know the circumstances appreciate just what was done at that time. The Congressional Committee was trying to fuse about twenty-three bills into one act.

KAYE. I associate myself with the point with respect to "self-contained works." There, I think, we are trying to articulate something which we can safely leave to the courts. If the work is truly independent and self-contained and it merely appears in contiguity with a copyrighted work--an analysis of the character of Hamlet printed in a set of Shakespeare, or an original song printed in a brochure which has public domain songs in it--I don't think we have to cover that here. If it is independent, I don't think we need worry what the courts may do because of its contiguity.

I also want to point out that although in subsection (d) we use the definition used before--namely, "an original work of authorship"--in (c) we use new language--"independent creation." I don't know whether that's intended to differ from "original work of authorship," but I think we should try to stick to the same phrase.

And I repeat that it seems to me that mere selection from material not subject to copyright, the mere act of omission, should not be regarded as authorship.

KAMINSTEIN. I think you have a good point on the previous one.

Mr. Schiffer, and then Mr. Nimmer. And we will resume on this subject right after lunch.

SCHIFFER. It seems to me that the use of the word "lawful" creates a rather intricate conflicts problem, because there are foreign statutes permitting translations under certain circumstances without permission of the copyright proprietor. So the translation is made lawfully where made; then let's say somebody wants to import copies of the translation. I think that the old business of "with the permission of the copyright proprietor" is much superior.

NIMMER. Let me just say briefly that, in terms of substance as distinguished from form, I feel this is a clear improvement over section 7, with the one exception of the "self-contained works," on which I would agree with Mr. Kaye.

It seems to me that the main virtue of this provision is making quite clear that which is only ambiguously clear in the present Act--namely, that the holder of a "new work" or "derivative work" copyright can only enforce it with respect to the copying of that which he has newly contributed. He can't thereby enforce rights in the old material that he has incorporated. This may be said to be implied in the present Act, but the courts, at least some courts, haven't gone along with that position, and I think this language makes that more clear.

It does seem to me in terms of form--it may be a matter of taste--I would prefer to see the whole thing called "derivative works," rather than dividing it into "compilations" and "derivative works." And, as indicated, I would exclude the "self-contained works." It seems that, in this draft, an arrangement made up of public domain materials is called a "compilation," but if it's made up of works in copyright it's then called a "derivative work." I don't think that's a significant distinction; I think it could lead to confusion. I would like to see "derivative work" used throughout.

KAMINSTEIN. We will expect you back at 2 o'clock.

KAMINSTEIN. Ladies and gentlemen, we will proceed now in an effort to finish as early as possible, but no later than 4:30, so that people can catch their trains and planes. We have copies of the transcript of the fourth Panel Meeting, March 15, 1962, which will be available at the door as you go out. The House Judiciary Committee has also very kindly offered to reprint the entire transcript of the prior Panel sessions, and thus they will be available to those who were not involved in the previous sessions.

I would like now to turn back to our discussion of section 2 on "Compilations, Derivative Works, and Additional Material."

OLSSON. I should like to address myself to the final sentence in 2(a), which reads:

> Protection for a compilation or derivative work employing pre-existing material in which copyright is subsisting shall be available only if such material has been used lawfully.

Is my understanding correct that the compiler of a 10,000-poem work would have no right to protection of the compilation, under this sentence, if he infringed in printing one of the 10,000 poems?

RINGER. I think this would be the effect.

OLSSON. Is that intended? I should think that anybody dealing with 10,000 poems would make an error with respect to one.

RINGER. I think that there is a genuine policy question here. This is probably the present law, but I think a good case could be made out for permitting copyright under those circumstances.

OLSSON. Barbara, we're making it so explicit in this particular case that I think perhaps we are forcing the court to reach an unjust decision.

RINGER. I think what Sam Tannenbaum was suggesting before the interval was that maybe you can take care of this under the doctrine of unclean hands or something. But the present law does make this explicit, and it seems to me a sufficiently important point to cover--whatever substantive results you finally come out with. The example you give is about as extreme, I think, as you can find on that side of the question.

KELLMAN. I want to refer to paragraph (d), but I'm not assuming thereby that everything before that has been discussed sufficiently. I'm referring to the words "and dependent for its existence." I'm not sure what that means.

I know the meaning of the words "based upon"; they have a definite meaning. I believe that, in using the word "dependent," you meant that it is true that the prior work is an integral part, and you included this provision to make that clear.

But the word "dependent" makes it a little uncertain. It could mean "dependent by reason of this provision" or "by reason of some other provision." My own feeling is that the words "based upon" are sufficient.

FINKELSTEIN. I just want to comment on the initial question raised by Harry Olsson. I'll cover two things, if possible, without trying to give precise wording.

If that final sentence of subdivision (a) were changed so that you protected only the new matter, and then, secondly, protected it only to the extent that there had been an authorization from the owner of the right under the original copyright, I wonder how far that would be from the principle embodied in the draft sentence. In other words, if you said, "Protection for a compilation or derivative work employing pre-existing material in which copyright is subsisting shall be available only to the extent that such use has been authorized by the owner of such rights." I just suggest that.

RINGER. This is certainly worth considering. It is a very constructive suggestion.

SCHIFFER. I was going to say that some of us over here seem to have some doubt if this is actually the present state of the law. In other words, if there were situations such as Mr. Olsson envisages, I shouldn't think that the whole work would be unable to secure copyright because of the one infringement in it. The consent of the one proprietor not having been obtained, I should think the law today would be that the thing fails for that one, and that's all.

RINGER. Actually, Mel Nimmer and I have had some correspondence on this point recently, and I rather took your view. In other words, if a case were presented such as Harry proposes, where the equities were so strongly on one side, it might be that a court would be reluctant to throw the thing out. But you have language in section 7 which is fairly explicit, and you would have to get around that in order to reach the result you suggest.

SCHULMAN. Mr. Chairman, I am reluctant again to bring up the question of recordings and my view of recordings and copyright, but I find myself again in a somewhat difficult position. Section (b) of 2 provides that "Protection...shall extend only to the original work contributed by the author of the compilation, derivative work, or additional material, as distinguished from any pre-existing material employed in the work as a whole." Then, under (d), a "derivative work" is defined to include a sound recording.

Now, an artist who records a musical composition, if we assume that he adds something to it that is entitled to protection, would hardly provide "additional material" unless he made a new arrangement. It says "additional material, as distinguished from pre-existing material employed."

Now, I think that there is an ambiguity there. And I think, unfortunately, we get right into the midst of something that we ought to discuss here, and that is the question of neighboring rights--because there is where we hit the very essence of neighboring rights, namely, the right of a performer who doesn't contribute authorship but contributes his talents as a performer. And I find that this section leads us right into that, because the provisions of subdivision (b), read with subdivision (d), demonstrate that kind of a difficulty. I think we ought to give a lot more consideration to that, and not just pass it over and say that "a recording is a recording is a recording."

PILPEL. I would like to address myself to a different question, namely, the inclusion of the word "index." I have recently had occasion to check the law and, while my research may not be exhaustive, so far as I know there is no clear answer at the present time to the question whether an index to a work is considered a "derivative work."

I think very important policy considerations can be advanced for not so considering it. For example, there may be an important work from the scholarly point of view. The authors or proprietors of the work may not get around to indexing it. I'm thinking of a situation where that is the case, and has been for about 75 years. May other scholars who want to make use of this work make an index of it? While the law is not now entirely clear I think the rule is that an index is not an infringement of a work indexed, and I submit that this should be the law unless there are clear pressing policy considerations to the contrary.

RINGER. This was precisely why we put the language in there, in an effort to raise the question so that we can face up to it. I think you know, and I certainly do, that this is a question that arises frequently in my experience--as to whether or not indexing is an exclusive right under the present copyright law. It's unclear, and by putting it in there we simply meant to raise the question, so that it could be discussed as a policy matter.

DUBIN. I find myself in complete accord with John Schulman's remarks--in view of this section, and section 1, and a couple of the questions that were addressed to Mr. Goldman as to whether performance was intended to be protected rather than the mere mechanical act of recording. If this draft intends to protect the performer in his performance, let's say so and have it right out in the open. Let's not try to drag it in by its

heels under the doctrine of protection of a sound recording. And if it is meant to apply to the protection of a performer, we are right back to the doctrine of neighboring rights. If we have to discuss it, let's discuss it.

This goes further than the protection of a mere sound recording as such. I think all of us are in favor of some sort of protection as far as unauthorized dubbing is concerned. But when we get into the field of the protection of a performance--leaving aside the Constitutional question that may be raised--you have a policy question also that I think merits some very serious discussion.

KAMINSTEIN. And we would hope that this group would consider it at much greater length when we talk about rights.

DUBIN. However, you cannot escape the fact that, in defining what can be protected in the following categories of works, you have said that a performance may be protected. Now, as to the extent to which it is to be protected, I agree that will be discussed later; but, query, should the performance itself be protected, or can it be protected constitutionally?

KAMINSTEIN. I still feel that it would be best to discuss this in its entirety at that time, and leave it for the moment in this unsettled state.

DUBIN. I'd like to be heard just once more, if I may. You cannot pass it by if you're going to give protection to a sound recording. You've got to discuss it initially.

Now, the extent of protection is something else. But should it be protected at all is something you cannot gloss over by saying, "We'll discuss it when we go into more detail." It involves the fundamental principle of whether a performance can be protected, whether it's on a recording or otherwise, or whether it should even be in the copyright law.

KAMINSTEIN. Well, I would certainly feel that it's appropriate now to discuss that point--whether this should be in the copyright law at all or whether it belongs in a separate law--and I would be glad to hear a discussion on that.

LICHTENWANGER. I just wanted to point out that, in addition to its value as a performance, a sound recording has value as a writing, under the constitutional meaning. In the case of folk songs, for instance, it may be the only writing that exists. This seems to be true in other areas, so that I think this element, as well as the performance angle and the mechanical angle, will have to be considered.

NIMMER. Well, just briefly on the index point, I think there is another side to that. One might as well say that if an author writes a very long work which is difficult to wade through, it would be helpful to the public if summaries were available. And yet I don't think anyone would argue that therefore people should be permitted to make summaries without the consent of the author, because this is a valuable right that, if the author chooses, he should be able to exploit exclusively.

I think similarly with indexes. This is a valuable adjunct to a book which, if the author wishes to exploit, and when he wishes to exploit, he should be able to have the exclusive right to do so.

KAMINSTEIN. Of course, I take it that there are two problems. Harriet's problem was with respect to a work that was 75 years old, so that you might not have had the question of consent, and you would have to face the question of whether this was copyrightable.

KARP. I think you can have the problem arise for a fairly recent work which is published by one publisher, by the author's consent, with an index, which is prepared by the publisher, not the author. Then the author authorizes the second publication of his work, and you would have the problem whether that second publisher would be free to use the index from the first work. In other words, when you go from hard-back to paperback publisher, can the latter pick up the trade edition index unless some arrangement had been made for it?

PILPEL. Could you have some concept of "non-user" here, as in other contexts? I mean, if a work exists for a certain period of time without an index, then why not give others the right to make an index on payment of something to the proprietor of the work? Or is that a concept that would make things even more complicated than they are now?

KAMINSTEIN. I have no question but that it would complicate matters. It goes over to some of the concepts we've seen as to translations in foreign laws.

OLSSON. Kami, you have announced on several occasions your anxiety--and I think that most of us share it--that we get to the end of the road in the copyright revision effort in the fairly near future. It occurs to me that leaving the subject of sound recordings in this act is going to lead all of us into squabbles, and probably endless debates, when we get to the subject of what rights shall be accorded to whatever people are going to get the rights with respect to sound recordings.

I suggest that we take sound recordings out of the proposed revision and either save it until later, as an addition to the Copyright Act, or that we deal with it in some other section of the law. I think we're probably going to hit some pretty spirited squabbles and disagreements in this area.

KAMINSTEIN. I am sure we will, Harry.

OLSSON. Our difficulties with the Rome Convention would make that, I think, a dependable prediction.

KAMINSTEIN. Would you expand that in just one way? Do you feel that they ought not be part of the copyright law at all? Are you opposed to protection for dubbing, for example?

OLSSON. I thought I made myself clear, Kami, that I think for the moment, with regard to revision, we ought to put the question aside, and then either later discuss it as a possible part of the copyright act--which we would then amend--or with respect to some other body of law, or not at all. I merely suggest that we put this aside, because of the length of time and attention it would probably consume, and make the attainment of your effort to have an early conclusion to copyright revision possible.

DERENBERG. I have a suggestion somewhat along the lines of the index problem. There is one current problem that you must have read about, and which turns up all the time in the educational field; and that has to do with separate publication of answer sheets and that sort of thing in college book material. It is very difficult under our existing law to find copyright protection for such material.

Is it a "derivative work" as defined here? Is it "part of the components"? Is copyright in it separately available? What is the effect of electronic computations, and so forth? Can we find a way of including the great deal of intellectual work that goes into the answer sheet, so as to protect the author as a creator of an original work?

KAMINSTEIN. We'd welcome suggestions, unless you are recommending that answer sheets be stated specifically as subject matter.

DERENBERG. I'm not suggesting anything so specific, but the language...

KAMINSTEIN. Well, this is one of our difficulties--as to how specific you become; and we've already heard criticism of this draft as being too specific.

SCHAEFFER. I was going to say that we are concerned presently with the question of copyrighting a sound recording, because we have had the decisions of the courts, both in the Tzena-Tzena case (Mills Music, Inc. v. Cromwell Music, Inc., 126 F. Supp. 54) and the Miracle Record case (Shapiro Bernstein Co., Inc. v. Miracle Record Co., Inc., 91 F. Supp. 473), in which the courts have held that the sale of the record

constituted a publication, and if not copyrighted went into public domain. So that it is something that we must presently consider, and I don't think we can push it under the table--particularly as to how far we're boing to go, as to what the rights are as far as rendition or performance and such things are concerned. But I do think that we have to consider it from the standpoint of whether the record itself can be copyrighted.

KELLMAN. I think there's a pretty large consensus, if I may be so bold as to say so, in favor of incorporating sound recordings as the expression of otherwise copyrightable material or as a "writing." Up to that point I think that the sound recordings are properly within the proposed law--aside from what will be done about dubbing, or "mirror copying" of sound recordings, or otherwise. In other words, I don't think you can take the whole subject of sound recordings and push it off. I agree with Mort Schaeffer and others that, as a "writing," sound recordings must be protected.

SCHIFFER. I concur with what Leon is saying with one addendum--that the place where we get into trouble is in the area of protecting performance as such, not the expression of a musical work in the form of a sound recording. But the trouble is that the line between musical creation and musical composition as embodied in a record, and performance, is not a sharp line, and the question (if we want to eliminate it I think we'll simplify the copyright revision problems) would be how to draw that line.

KAMINSTEIN. We'd love to find out, actually.

SARGOY. Intellectually, I see no difference between the two types of things. The man who collects Vivaldi sonatas and concertos and puts them into a book or a compilation is deemed to be the author of the derivative work. I think there is even more of authorship when a Heifetz plays those concertos or sonatas in a recorded, permanent, fixed, tangible form. And to that extent there is no intellectual difference.

However, I recognize there is a great amount of economic objection to protecting the second type of thing. I think its inclusion might interfere with the progress of any general revision of the law. What could very well be done, I think, is to make the decision, here in this law, to have some provision to the effect that there shall be no protection for a performance or an interpretive rendition of a work, either by itself or that has been captured on a recording, and leave that question, perhaps, to later amendment of the law or some other law.

However, the language here seems reasonable and logical enough. There could be sound recordings of literary material. A teacher can be a compiler of various materials taken from the public domain, or of

others with permission of the copyright owner, for teaching purposes, which he puts into a teaching record--so that there is a sound recording of that nature that could be protected.

But I do think the answer to this very serious problem of the interpretive rendition or performance, which is basically an economic problem, is one that should have very clear indication in the proposed law that no protection in that respect is now intended to be given.

SCHULMAN. Mr. Chairman, I am not prepared to be as pessimistic as some of the others, and I don't think we can throw out the question of sound recordings or sweep it under the rug in hope someday to solve the problem. I think it's got to be treated to some extent in this law. I think if possible it should be solved.

On the other hand, I think one of our difficulties is that we get into recordings piecemeal. And my suggestion, if I may make a suggestion of this kind, is that a full session be devoted solely to the question of recordings--not only with respect to the rights in recordings, but the limitations and the extent of protection--so that people will be talking of the whole ball of wax, instead of being in the position of saying, "I am willing to agree to the protection of recordings, provided...," and putting off the "provided" for later on.

I think if we devoted an entire day to this complete subject, so that we had a clear outline of not only the rights to be protected, but the nature of the protection and the limitations, I think we might come to a clearer idea of what our difficulty is and the extent to which we can include it in the statute. It just cannot be ignored.

KAMINSTEIN. I think there may be some real value in trying to do that, because I have never yet participated in a discussion on sound recordings that didn't run on and on. I would hope that we could formulate the problem, and that we could receive from you suggestions as to formulating the problem and narrowing the issue, so that we could discuss just that without getting into the entire field.

BURTON. I just have two points, Kami. One, I wholeheartedly agree with what John Schulman said. But I think that, in the course of the discussion that commenced before lunch and has continued on, two things have been overlooked. No one has gotten into a discussion of rights, nor is that on the agenda. That's specifically excluded--as to what rights should be granted in sound recordings.

I think what has also been overlooked completely here is what sound recordings are. And with all due respect to Mr. Sargoy, and even Mr. Schulman, they keep referring to Heifetz or Rubinstein and a

rendition of a musical composition--something attributed, by the way, to my friend Mr. Finkelstein which he didn't say. But the art of sound recording, if you will think about it, is very much like the art of the total production of a motion picture.

I would remind all of you that the best-selling sound recording in the United States now or for many, many years past--perhaps for all time--is "The First Family." Now, "The First Family" is to all intents and purposes a work which is entertaining, which has creativity in all aspects, and which cannot easily be characterized as a single creative effort. It certainly is as good as some of the motion pictures which have been characterized as trash.

I would suggest to all of you that the subject of sound recordings cannot be brushed under the table. Don't speak of it in terms of interpretive art. There are many more things. You might just as well say that a motion picture is all the result of the acting, which is not true. There are people who are involved in direction; there are people who are involved in sound effects. It's a totality of production, and I don't think that's understood.

It isn't just a question of Mr. Heifetz going into a street and performing a work, and then you argue whether you should protect Mr. Heifetz. That's the easiest case to argue. A sound recording is a totality. It is like a motion picture; it is like a photograph. And many people who have been involved in the recording industry today regard this as an art form. I think it's got to be made the subject of separate consideration, but I think it's got to be borne in mind that we are not talking about any single person's interpretation.

Now there's been a great deal of talk in the popular music industry about the "Nashville sound." I don't know whether it's valid or not, although it seems to sell quite a few records. But, for whatever it means, the "Nashville sound" is the composite of the effort of many people, just as a motion picture is the composite effort of many people. And I think we should approach it on that ground.

KAMINSTEIN. Mr. Colby will rise to the defense of the motion picture industry.

COLBY. The industry needs no defense. [Laughter]

By mentioning sound recordings in two places here, there is a possible suggestion that this body is accepting the principle of protection. Whether we discuss that now or later is of course a matter for the Chairman. But we have previously had this problem on the Neighboring Rights Convention. Perhaps we become somewhat committed to the principle by activity, but we did not sign the treaty, possibly because the state of our law did not then permit it.

I would hope that, by including it this way, there is no suggestion that the principle has been approved and cannot be objected to later. If we can have that position, then when we discuss it I suppose we can object to the basic principle. But I would hope that we are not, by this method of raising it, committed to the Neighboring Rights Convention or its principles.

KAMINSTEIN. I should think that would be clear from the transcript.

NIMMER. Well, if Mr. Colby wants to be clear about avoiding estoppel, I want to be clear about avoiding laches. [Laughter]. I just want to say, briefly, that the parallel to a motion picture, I think, is very well taken. I completely agree with Mr. Burton's remarks in that respect. On the other hand, taking into account Mr. Sargoy's comments about the economic aspects, certainly this is something we have to discuss when we get to rights. At the risk of anticipating, it seems to me that at the very least record piracy (that is, the re-recording of the record as distinguished from copying the contents in a newly-performed record) is a right that might well be recognized--with, I think (I may be wrong), a minimum of controversy.

When you get into the other areas of imitation, where copyright in a motion picture will protect against imitating the story in a newly-produced motion picture, it may well be that the rights should not extend that far in records. But I think if this minimal area of protection--record piracy--does properly come within copyright, then there should be no problem at this stage about including it in the list of protectible works.

KAMINSTEIN. Well, I can assure you that there will be a further opportunity to discuss it, and that you are not committed to pro or con positions at this point. Are there any other comments on section 2, before we go to the protection of foreign works?

WHICHER. I have some difficulty in understanding section (c) as it's presently written. It speaks of "works, parts of works, or material not subject to copyright." Does the phrase "not subject to copyright" modify only "material"?

RINGER. Yes. That was what was intended.

WHICHER. What does it cover? I don't quite understand it. Give me an example.

RINGER. Names and addresses in a telephone book is one example, I think.

WASSERSTROM. Bird calls?

RINGER. Bird calls possibly. I was at the Museum of Modern Art recently and there was a collection of nuts and bolts that had been glued to a board. That sort of thing. [Laughter]

SCHULMAN. That's a work of art.

RINGER. It's also a compilation.

WHICHER. In subdivision (c) we have also again the words "independent creation," and I would say the same thing about that there that I said before.

RINGER. I would agree with you.

GOLDBERG. There seems to me to be a possible inconsistency between the language of section 2(a) and the language of section 2(d)--where in (a) we talk about the "derivative work" representing "an original work of authorship," and in (d), at the end, we talk about the "alterations" representing "an original work of authorship." Now is it the "alterations," separated out from the "derivative work," which must have the qualities of originality, authorship, et cetera, or is it the "derivative work" itself?

It seems to me that it is very difficult to separate out the additional elements, the alterations, and, in and of themselves, determine whether they are original, et cetera.

RINGER. This is a good question. I'll try to answer it this way. "Alterations" was intended to be an omnibus word, I believe, that would cover the earlier terms that are used in this sentence. This is a difficult concept to express.

The problem has been with the Copyright Office, as most of you know, for about fifty years and, particularly with respect to editing in music (diacritical markings, and what have you), has been a burning issue off and on for all that time. Divorced from the basic work these markings are meaningless, but they are all you can protect. This is an issue that is now before the Intergovernmental Copyright Committee--the question of efforts to extend the term of copyright by re-editing a piece of classical music or an opera and thereby claiming a new copyright.

This language represents an effort to try to explain that, in the situation in question, all you are protecting are the additions--the "alterations," if you will--even though these are very, very difficult to distinguish from the work itself. If you substitute three notes for four in a chord, for example, what is it that you've done? It's an " alteration," but you can't really point at anything.

The effort here was to make this sentence revolve around "as a whole." In other words, you look at "the alterations considered as a whole," as compared with the original work that has been altered. And if these, "as a whole," constitute work of authorship as distinguished from mere mechanical musicianship, then they are protectable. This was what we meant, but it's very difficult to express, and I think your point is well taken.

OLSSON. It is difficult for lawyers to keep away from language, and I can't resist, since we've started to talk about it. Wouldn't the substitution of the word "they" for "alterations" solve the problem completely?

RINGER. Could be.

ROTHENBERG. I recognize that in subdivision (d) you don't intend to give every kind of example of a derivative work, but since I do see the word "dramatization" I would suggest that you consider including the words "novelization" and "fictionization," which one sees repeatedly now in motion picture and television contracts with authors.

KAMINSTEIN. I would like to turn now to a consideration of the alternative suggestions we have made with respect to foreign works in section 3 on "National Origin." Before I do so, however, some of you have asked who the distinguished-looking colleague on my extreme right is, and I should like to tell those of you who have not met him before that he is the Deputy Librarian of Congress, Rutherford Rogers. [Applause]

I am going to call on Arpad Bogsch to explain what we have done in section 3, and to discuss the drafts.

BOGSCH. Section 3 deals with the national origin of works. You will find two texts, "A" and "B". These are two alternatives. "A" consists of a single paragraph, and expresses in statutory language the recommendations contained in the Register's Report.

"B" is the longer one of the two. It is, in essence, a streamlined version of the provisions of the present law, with some differences. The main difference is that, instead of specifying the requirement of reciprocity, as the present law does, Alternative "B" would leave the matter of reciprocity to the discretion of the President. Another difference is that "B" would extend protection to works first published in the United States.

The result under both alternatives may be the same. It is the approach which is different. Under "A", the new statute would extend to all works, irrespective of national origin, except to those which

the President by proclamation excludes. Under "B", the statute would extend to all unpublished works and to three kinds of published works--namely, first, American works, second, works to be protected under the three multilateral conventions to which we are party, and third, works originating in countries the President may designate by proclamation.

Views in earlier discussions have differed as to which of the two approaches is preferable, and the two most important arguments, or groups of arguments, were the following.

Some said that Alternative "A" means that we would protect nationals of countries which do not protect American works. "Why should we be so generous?" these people ask. Others believe that the question was not correctly put, since protection will be extended in our discretion, and can be cut off by Presidential proclamation. And if there is generosity, it would probably benefit the United States user--such as the publisher, translator, adapter--more than the foreign author.

The second group of arguments centered around the following question. Some said that Alternative "A" would considerably diminish the incentive for other countries to adhere to the Universal Copyright Convention. Others said that adherence would still be attractive in order to establish relations with some forty other countries and, as to the United States, in order to avoid deposit and registration--if they remain a requirement or are made a condition of remedies and the like.

There are also some arguments which will, I'm sure, come out during the discussion.

KAMINSTEIN. I should like to emphasize that we are aware of the differing opinions, or there would not be alternative drafts. We welcome suggestions as to improving the drafts, rather than arguments as to which ones you prefer, unless you have not already told us this.

DUBIN. Well, I think most of my comments were contained in Arpad's resumé of the arguments of people who thought you were too generous. But, as far as Alternative "A" is concerned, if it is our policy--or our hope, as I think was announced before by the Register--that we try to get other countries to adhere to the UCC, Alternative "A" certainly would be no incentive--because they can get the protection that they want from this country without joining the UCC, which would mean there would be no incentive for them to join.

Alternative "B" is quite an improvement, but I do have only one objection, primarily, there. (And that is without regard to what defects, if any, exist in the UCC, because I don't think it's our

province to discuss those at this time). I am unable to see any reason why protection for unpublished works should be granted without regard to the citizenship of the author, while we still restrict protection for published works to the categories outlined.

I realize there are one or two cases which, perhaps unfairly, have dealt with the author--particularly the Leibowitz case--as far as an alien is concerned. But I'm trying to see the reason why unpublished works should be protected per se, without regard to the citizenship or domicile of the author, and a restriction applied as to published works. I do not believe that unpublished works should receive a greater degree, as far as protection is concerned, than published works. The restriction still should apply, as far as citizenship or domicile is concerned, for unpublished works.

Other than that, Alternative "B" is quite a reasonable suggestion.

KAMINSTEIN. What do you conceive as to the present state of the law as to unpublished works?

DUBIN. Unpublished works would not be protected under the copyright act.

KAMINSTEIN. I think that there is a real question as to whether that's true.

DUBIN. Well, I may send the Leibowitz case over.

KAMINSTEIN. I think others have argued that this is the situation today--that unpublished works are protected--and this would be a basis for the draft here.

ROTHENBERG. I think we would have an anomalous situation, through our membership in the UCC, where we agreed to protect works first published in a UCC member country, if we permit the wholesale taking of works which might eventually be so published, when they are still in the unpublished state, simply because the author is from a non-member country. That would deprive the publisher in the member country of receiving the benefit of copyright when he does publish and seek to enforce his UCC membership--because the work will have already been taken for the United States market, and lawful copies would have already been made. I think that's one reason for protecting the works while they are still in their unpublished state, irrespective of the country of the author.

I would like to address myself to Alternative "A", which seems to me to permit the President in his discretion to issue a proclamation which could be harmful to a United States citizen who happened to be domiciled

in a country such as Russia, if the proclamation were directed against Russia. I think it should read, "...with respect to works of authors who are citizens of and domiciled," as opposed to "or domiciled in a designated nation." That would similarly affect not only a United States citizen; it could effect a Canadian citizen, or any other citizen of a UCC country who happened to be domiciled in the designated country.

And I also wonder whether the U.S. citizen, or a citizen of a UCC country, or a party who is domiciled in a UCC country, should be punished for a first publication in Russia--if that be the designated country--especially when this may be determined by entrepreneurs or disseminators over whom the author may not have control, as a practical matter (if they have any awareness at all of this copyright situation).

KELLMAN. As I read both alternatives, a person living in this country who is a citizen of a country such as the Soviet Union, which does not extend copyright protection to United States citizens, could get copyright in a work if it were published here. In Alternative "A", the President could, by proclamation remove or exclude that protection. In Alternative "B", it seems to me that the proclamation that the President would invoke or create would only apply to (4), and would not apply to anything else, so that certainly, for an unpublished work, again a citizen of a country such as the Soviet Union would have protection.

It seems to me that, in both alternatives (I think this would be more likely under Alternative "B", because under Alternative "A" it would have to be extended specifically for that purpose), with respect to such nations, the converse should take place. Their citizens should not have copyright unless the President proclaims that they do. I think that would be politically more desirable.

Let the President be able to grant it, and let the statute, by its terms, exclude it unless the President does grant it.

KAYE. I've already expressed my opposition to Alternative "A". In Alternative "B", it seems to me that we enlarge the effect of our present law--both in itself and when read together with the UCC--in a number of respects. I am one of those who think that section (a) would increase statutory protection of unpublished works.

Now, on subsection (b)(1), the present protection of a stateless person depends in part upon his domicile; that would be in accordance with Protocol 1 of the UCC. On subdivision (2) of (b), first publication in the United States now brings about investiture of copyright only if the author is domiciled in the United States, if he is not a citizen.

And, although subdivision (3) is more or less in accord, I think, with Protocol 2 of the UCC, I would hope that, although this protection were made available, it would be circumscribed in the same way as we consider circumscribing the powers of the United States. The draft before us contemplates that the United States would not have copyright in documents that were issued by its officials in their official capacities, but this clause--unless we circumscribe it in some way--means that an official pronouncement of the U.N. could not be published in the United States in a newspaper, unless the consent of the U.N. was first obtained.

BOGSCH. Your last remark, I think, is subject to a qualification. It depends, of course, whether the United Nations has put a copyright notice on it. If it hasn't--and normally it doesn't--then of course it would be in the public domain.

KAYE. Are we sure that, under this statute, a copyright notice will be required to commence copyright?

BOGSCH. The UCC provides that we can require the placing of a copyright notice on published works; otherwise we may deny protection.

KAMINSTEIN. The protocol of the UCC specifically covers this.

KAYE. Yes, I said that this seemed to be more or less in accordance with Protocol 2, and the provisions of that seem to have gone into effect. But I should think that, despite the fact that we say that protection may be available, we should be careful to say that the U.N. does not have greater rights than the United States under the copyright statute.

KARP. I had expressed my opinion at previous panel meetings as favoring a statute which gave protection to any author of any country, regardless of national origin or the condition of protection afforded by his country, and I would still prefer that alternative.

If Alternative "A" of the draft were adopted, I think that Mr. Rothenberg has pointed out that two glaring omissions or gaps would be created that could be very detrimental to American authors and composers, and I sincerely hope that they'll be closed.

Now, on the last portion of Alternative "A", I'd like to ask whether it was the intention that the President be given greater power to act by proclamation than he now has under section 9 of the Act. In other words, may he issue a proclamation which would deny protection to authors of another country on any ground other than the absence of reciprocal conditions? As written now, it does vest completely unlimited authority, to the extent that it may even be an unconstitutional grant of power.

Also, it gives the President the power not only to cut off protection, but to write new copyright provisions for the authors of those countries--because he's allowed to give protection subject to specified conditions or limitations. And, by imposing conditions or limitations, he may be setting up a whole new executive area of copyright for foreign authors that we don't have in the law today.

KAMINSTEIN. It's unlikely that any President would, but you have a point.

KARP. It's just barely possible under your draft bill.

SARGOY. I see no reason why we should not continue to give protection to unpublished works without regard to national origin. We do so today, at common law, on the theory that these works are personal property. And we protect the personal property of any person, regardless of his origin--unless he is an enemy alien in time of war, in which case certain special provisions apply.

I would tend to prefer the type of approach of Alternative "B" so as to induce entry into the Universal Copyright Convention, where at least we can get some element of reciprocity. But I would suggest, as to those who may not join the Universal Copyright Convention--as to the nationals of those countries--that consideration be given as to whether the works of non-UCC foreign authors shall be protected only if they are registered with our Copyright Office, and then only against infringements which may be commenced subsequent to the date of registration.

GOLDBERG. It seems to me, following up on Stan Rothenberg's point, that perhaps this might best be handled by approaching it very specifically rather than broadly--by giving the President the power under Alternative "A" to issue a proclamation revoking protection on works which would otherwise be entitled to protection solely by reason of the nationality or domicile of the author with respect to a designated nation, or solely by reason of first publication in the designated nation.

SCHULMAN. It seems to me that Alternative "A" is too radical a departure from tradition. I should be the last one to speak of that, because I don't hesitate to depart from the past. But it seems to me that we gain nothing. I have yet to hear an argument, a valid argument, as to why we should depart from a position which has been traditional, not only in the United States but throughout the world, in international copyright.

There are very few countries of the world which have ever given copyright without some quid pro quo or some degree of reciprocity.

We have worked hard to build up an international community based on reciprocal treaties, reciprocal rights, national treatment, and concepts of that kind. And I think it would be a mistake to depart from that, for many reasons.

In the first place, I think that we would discourage or take away some of the incentive to build up our relationships under the Universal Copyright treaty. I think we would incur opposition in Congress. Why give rights to Russians when we don't have to, and they don't give rights to us?

In all these things I see no reason for gathering all that opposition merely for a theoretical principle. And I see nothing to be gained by being, as Arpad Bogsch says, "over-generous." I don't think of being under-generous. I think it's merely asking for the conventional principle of quid pro quo. "You protect our works and we'll protect yours." And I think it's a fair principle.

SCHIFFER. It seems to me that a good deal of the concept of reciprocity goes down the drain if your definition of "first publish would include something such as a Telstar retransmission. Now, don't really have a definition of "publication" here so far, but the discussion that I've heard here before, and in other places, has indicated that the concept would be considerably broader than that which we now have.

That would mean that, for example, a broadcast or other material originating in Russia would still come within the concept of so-called "first publication" very, very rapidly, and would actually acquire another nationality under which we would be obligated to protect it. So I think any argument based on the concept of reciprocity will not work practically as determinative of the type of foreign protection we want to get into. We do need a definition, I think, of what you mean by "first publication" before you can go much further with this.

COLBY. In Alternative "B", section 3(a), does the phrase "available for unpublished works" indicate that there will be a formality for protection, such as registration, or does it indicate that common law protection will be abolished or brought under the Federal statute? Or are we saving that for future discussion?

KAMINSTEIN. We're saving it. We should have something to talk about at future meetings.

DERENBERG. In connection with a definition of "first publication," while I am inclined to like the approach of "A", I am puzzled that there is no indication in "B" with regard to any Berne Convention work.

I suppose somewhere, subsequently, there will be some reference to the fact that a work simultaneously published in the United States (whatever "simultaneous" will be) would be covered--so that a work that is published in Switzerland, let us say, but is simultaneously published here, would for this purpose be considered a work first published in the United States--because we certainly expect to receive protection in the reverse situation when our works are published abroad and here simultaneously. Is that something that is covered later?

BOGSCH. There is no doubt that we receive the benefits of the thirty-day simultaneous publication principle of the Berne Convention, and this has not been cut off, nothwithstanding the creation of the UCC. But there is nothing in the UCC which obliges us to grant a similar advantage or facility to the Europeans or other countries, and therefore it has not been included.

DUBIN. Do I understand, Arpad, that the United States, which is a non-Berne signatory, gets the benefit of the definition of simultaneous publication of thirty days? I thought that just applied to signatory countries.

BOGSCH. No, it applies to any country.

SCHIFFER. It isn't a question of our obligation, to my mind, to extend it. Once we get into "first publication," American authors situated abroad, or others who may legitimately be entitled to protection, may require some leeway in the definition of "first publication" to secure their rights legitimately. In other words, if by "first publication" it means literally first publication, there may be many people who are in fact deprived of the benefits that you intend to give them. So I wonder whether we won't necessarily go to some leeway for the grace period provision.

BURTON. I have, certainly, a strong preference for Alternative "B." But I think there's one point that should be made that has not been made. I noticed in the comments that have gone before me that there were several references to the problems of the Soviet Union--the possible Congressional reaction that might result. But I would remind all of you that, in the world today--and I won't even guess at the exact figures but I will give you thirty as a beginning--there are a number of new states.

Now I say that there is a fundamental question here of national policy. Many of the new states have at this point no domestic copyright protection. We of course go along with the suggestion that American authors should be protected by taking out the word "domicile" as applying to them. But bear this in mind--that we owe a national duty

to the dozens of new states that are coming up all over the world and have many problems other than enacting laws protecting intellectual property, and that these people may, for a time, have to secure a type of free ride.

I would point out that, for many years, Latin American countries have not done great honor to American rights in terms of honoring existing treaty obligations. Now you have the so-called "uncommitted nations" of Africa, of Asia, of the islands in the Pacific. There are four embassies, four U. N. Embassies, within walking distance of my home; not one has yet had a domestic copyright law--and they don't pay taxes.

I would suggest to all of you, before you too firmly commit your thinking, that there is a matter of grave national interest here--and that is, extending a hand to the intellectual, unpublished output of these many new states, and giving to the executive branch of our Government the power to turn it off--because I think that, through the encouragement of the intellectual development of these new states, may lie one of the areas where we can discharge a national duty and increase our national prestige.

KAMINSTEIN. There is a current problem which lies in the same direction. That involves new states that have split off from countries with which we do have relations. In some of these new countries United States citizens are now receiving protection as the result of the carry-over of the old law, but the status of works of these countries is in doubt in the United States.

I am glad that Harvey Winter of the State Department is here to hear some of this discussion. We have discussed some of these provisions with the State Department, but they have taken no official position.

Again, I want to emphasize something I should have said at the outset of the meeting. The drafts we have sent out represent our own thinking, not necessarily our final thinking, and in no way represent a Government position.

FINKELSTEIN. I have a question here. In subdivisions (1) and (2) we refer to specific treaties that are now in effect, and we write those into a statute. Under the existing law no specific treaty is mentioned. It merely mentions "an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party."

Now, suppose one of these treaties now in effect--let's just say, for example, the Mexico City Treaty of 1902--is denounced by the Executive Branch of the Government. (And I think that's the way

treaties are denounced). Does that mean that we have to get both Houses of Congress to pass a law taking that treaty out of this statute?

If it does mean that, it would seem to me that we ought not to treat those specific treaties in the statute, but that we should use general language such as the existing law does. We might add "...to which the United States may become or has become a party." That, it seems to me, would automatically cover UCC, and these others so long as they remain in effect.

KAMINSTEIN. I'm glad you raised this problem. We wrestled with the question of a general clause which would take effect automatically--for example, on amendment of UCC, as well as in this case you mention. I would like to discuss this further with the State Department technicians--as to the appropriate way of accomplishing the result, which evidently everyone would want, in the case you mentioned.

WHICHER. Just a minor question on Alternative "B", subdivision (b)(1), where we give protection to the published works of sovereign authorities of foreign nations, and section 4, which we get to later, and which gives some limited protection to the United States Government. I see no mention of publications of state governments or local governments within the United States. Presumably most of those would be covered by first publication in the United States, but if they wanted to put out a guide book and publish it first in France, maybe they ought to have protection on it. That is a possibility that you might want to consider.

KAMINSTEIN. That is really reaching for it. Thank you.

I'd like to turn now to consideration of the draft section 4 for the sake of uniformity, which, should have been headed "Subject Matter of Copyright: United States Government Publications." And I would like to call on George Cary, the Deputy Register, to speak on this point.

I want to say, too, that I appreciate the fact that representatives of both the House and Senate Judiciary Committees have come to the meeting, and that so many people from other Government agencies have been able to attend.

CARY. The original recommendations with regard to Government publications, as you are no doubt aware, may be found on page 133 of the Register's Report, and the proposed implementation of them appears in section 4 of the draft bill. Since the suggestions for implementation coincide in most details with the original recommendations, no real purpose would be served by an elaborate repetition of each of the specific arguments, so I would like to confine my remarks to a brief review of the implementing provisions in the draft section before you.

To turn to the draft language of section 4, subsection (a), you will note that the first sentence dovetails with the recommendation of the Report that the general prohibition against copyright in publications of the United States Government be retained, and that this term ("Government publications," as we call them) be defined as published works produced for the Government by an officer or employee in the course of executing the duties required of him by his official position.

The second sentence of section 4 is intended to clarify the definition by specifying that the method of printing or distributing of copies does not govern the availability of copyright protection. For example, the mere fact that a privately-produced work may be published by the Government Printing Office does not exclude it from protection; and, in the reverse situation, the fact that a Government-produced work is printed or distributed under private auspices does not remove the work from the prohibition of the first sentence. It might be said that the first part of the second sentence in fact embalms the holdings of past court decisions, and that the latter portion could be considered the other side of the coin.

The last sentence of subsection (a) clarifies a point which is not specified in the present law--namely, that the Government may own copyright in an unpublished work. This result appears in the present law by implication, but it is vague, and this draft is intended to make that a little more certain. In addition, it makes clear that copyright in a privately-produced work may be assigned, licensed, or bequeathed to the Government.

It will be noted that, although the Report recommended the deletion of a provision in the Printing Law which also prohibits copyright in Government publications, we do not cover that in this draft. The proper place for such a provision would probably be at the end of the bill, in the transitional provisions, since what we are dealing with here today is an amendment of Title 17 and, as you know, the Printing Law does not appear in Title 17.

Now, the comments that have been received from Panel members and others with respect to the material covered in subsection (a) were very few in number. Several of those who replied expressed a general accord with all of the recommendations on this subject. Of those who commented specifically on each individual recommendation, all agreed that no copyright should subsist in a Government publication and that the term should be defined, although only one of the replies suggested any tentative thoughts as to the substance of the definition. Two of those commenting favored a specific provision, to be included in the defintion, which would permit Government contractors to obtain copyright in material which they produce; one very strongly opposed such a concept.

Going now to subsection (b) of the draft proposal, this merely contains a provision that has been incorporated in section 8 of the

present law since 1938. This provision was not referred to in the Report, but there is a question as to whether it would be appropriate for us to attempt to delete a provision that was proposed and sponsored by another Government agency. For your information, this section--dealing with the right of the Postmaster General to copyright catalogs of stamps--was not sponsored by the Copyright Office, but was included in a general Post Office Department bill. It is my recollection that the provision was sponsored by a group of philatelists.

Subsection (c) of the draft incorporates recommendation (b) on page 133 of the Report--namely, that there should be some central Government agency to authorize, in a few limited types of cases, the obtaining of a copyright by a Government agency. Very few commented on this proposal in their replies. Of those who did, two opposed it outright, one indicated certain misgivings but did not oppose it, while three others expressed objection only to the last two of the examples that are mentioned on page 131 of the Report. On that page we list several cases in which Government agencies have indicated a desire to obtain copyrights, and the last two were the ones that seemed to give rise to questions.

In general, the Government agencies that replied have not taken a position with respect to this problem. One agency, however, did express very strongly its desire for some means of protecting its works, which circulate primarily in foreign countries.

With respect to the provision of subsection (c) empowering the Joint Committee on Printing to regulate exclusive licensing and transfers of any copyrights owned by the Government, only one comment was received. This comment simply expressed doubt as to whether such a provision, without more, was needed.

Subsection (d), which contains a saving clause and a requirement that the Government place a notice on private material which it uses, likewise elicited only one comment, and this merely expressed some reservations.

KAMINSTEIN. Thank you. Since the issuance of the Report there has been a much greater interest in this area, and I assume that we will have further comments.

BRYLAWSKI. Mr. Kaminstein, the thing that bothers me is that every published work comes into existence as an unpublished work. And, as I read this, while the Government is given the right of copyright in the unpublished work, as soon as they publish it, it then becomes public domain. They can't have a copyright in the published work, but they do enjoy copyright in an unpublished work. I can conceive that an author of an unpublished play has the right of performance, or the author of a musical composition has the right of performance in his unpublished work, but what good is an unpublished work to the Government if, as soon as it makes use of it, it forfeits its copyright?

CARY. May I answer that, Fulton? The only attempt here, in drawing up this section, has been to maintain what we believe to be the present status of the law, and also to attempt to clarify some parts of it. Under the present law, as you correctly put it, the Government cannot get copyright in a published work, but the language of that present law would indicate that Government agencies may have an unpublished copyright. This draft language is merely intended to incorporate that into the proposed bill.

KAYE. I wonder whether the distinction between published and unpublished works shouldn't be re-examined in the light of modern methods of dissemination. Here we say that the United States may initially own copyright in unpublished works. Take an emergency message of the President of the United States which comes over all the broadcasting facilities in the country. It is not published. It seems to me that there should not be any presumption that it is copyrighted.

I am wondering whether this entire concept should not be re-examined, and the United States prevented from holding copyright in its official documents created by its officials and employees in the course of their duties. The present distinction, it seems to me, may have been somewhat eroded by the fact that we now have messages of primary importance disseminated in unpublished form.

I continue to have some difficulty with this concept of self-contained portions of works, which I don't think we ought to refer to.

I have one other comment. Apparently the Government can grant copyright on works at any time that it can show the Committee on Printing that it can save money by giving somebody copyright. Well, I should think that would be so in every case. If you can get a publisher to publish something at his expense, it's cheaper than the Government Printing Office. I wonder whether this exceptional privilege here should not be entrusted to committees with a broader view of the national welfare than the Printing Office, and on wider grounds than the mere saving of money.

WHICHER. My only comment is on subdivision (a) where at the end it speaks of the Government holding copyright "by assignment, gift, exclusive license, or bequest." Has any consideration been given to the possibility of acquiring copyrights by eminent domain?

KAMINSTEIN. Some consideration of this was given several years ago when we had a bill which presented the question of infringement actions against the Government. Otherwise I don't know of any consideration of that type.

RINGER. Are you favoring that? I'm just curious.

WHICHER. I'm not taking a position. I'm just asking if it has been considered.

SKORA. It's quite obvious that Government documents, generally, should be given wide dissemination to the general public and perhaps don't require copyright. But the U. S. Information Agency deals in the production of motion pictures, television programs, books, pamphlets--the whole range of materials--and there are situations where it's to the national advantage, I believe, for the Government to be able to have a copyright in those creative materials, and perhaps to be able to assign or transfer rights or to license them for dissemination abroad.

I think that the clarification that this provision gives the present law is a good one--between unpublished and published works, and the fact that a "Government publication" is one created by an officer or employee of the Government.

I wonder, however, whether the Joint Committee on Printing would be the most appropriate body to be the central repository, if there is to be one. Certainly, from our point of view, I would think it would be preferable--if there should be such a repository--that it be in the Executive Branch of the Government. Whether it should be in the Bureau of the Budget or the White House I couldn't say, but I think it ought to be in the Executive Branch of the Government.

One other point. There is proposed here a provision which specifies that the Government shall be liable for infringement of copyright held by other proprietors. There is a Public Law which does now make the Government liable, as you know, for infringement of copyright. I wonder if this new section is necessary; certainly the two ought to be looked at side by side.

As I recall, that particular law does have an exception in it providing that infringements by the Government which take place abroad are not actionable against the United States Government. I don't think it was the intent here that infringements taking place outside of the United States would be an infringement under United States copyright law, but I do raise this point.

KAMINSTEIN. It's a good point. There is an exception in that law, and there was no intention of overriding it here.

CARY. May I reply partially to that, Mr. Skora? Under this provision the Government may actually get permission from the private party to use the material, so there is no infringement in the sense of using it without their permission. But it was thought desirable to put this provision in here to require the Government to use the notice, so that anyone else who picked the material up and read it would be aware of the private rights, and would not subject himself to infringement. So this matter is a little different, I believe, from section 1498 which you mentioned.

KAMINSTEIN. Mr. Rosenfield...

ROSENFIELD. Thank you, Mr. Kaminstein. May I first say that I appreciate the invitation to be here in view of certain other situations that are pending. I would like, if you will permit me, to make some comments about several of the sections here.

First of all, I find it hard to accept the first sentence and the provision which deals with copyright for unpublished works. I find it awkward to have a law which does not make sense to the public in general. And I think the public as a whole, apart from the professionals in this field, are going to think it is nonsense to have a law which says that the Government cannot have copyright in published work but can have it in unpublished work. It does not make sense to the public at large.

Secondly, and perhaps even more important, this proposal defeats the very purpose of the no-copyright provision, because it gives an incentive to non-publication. The purpose of the no-copyright provision is to make such material publicly available; but by giving the Government a copyright on the non-published writing, the proposal makes it possible to monopolize it to a greater degree.

I am perfectly aware of the difficulties. Barbara Ringer has indicated that one of the problems is to avoid misuse of unpublished material. There are other ways of dealing with this. There are internal orders, there are the ordinary administrative controls over individuals, which can deal with that.

Next, I am a little puzzled at the definition, especially since George said that the definition of "service" was intended to comply with what the Report said. The Report said that the actual practice of your Office was to regard as a "Government publication" that which was produced within the scope of employment. Here the term is "in the course of executing the duties required of him by his office or position." I take that to be substantially different. First of all...

KAMINSTEIN. In which way? Do you feel it is more restrictive or less?

ROSENFIELD. Far more restrictive. First of all, let me point out that the original provision grew out of the fact that Congressman Richardson got together some Presidential messages. Certainly this was not "required of him" by his duties. And yet the statute was designed to meet that particular provision.

Secondly, the term "within the scope of his employment" has a fairly well-defined meaning in law. The term "executing the duties" has me puzzled. Let me give you an example--and I take a specific example

of volumes that have been published. Suppose a Government employee prepares some material while he is in the service, but publishes it after he is out of the service of the Government. Is this "executing the duties required of him by his office or position"? In other words, I would prefer seeing what George Cary said was the purpose--to comply with what the Report said.

I think it also is to be borne in mind, as to the term "required," that a very small portion of the people who write for the Federal Government are hired as writers. Most of them are hired as lawyers, as economists, or as scientists, and their job classifications do not require them to write; therefore, you get into a very difficult problem with use of the term "requiring." I think it will be borne out that very few people are "required" by their duties to write.

Furthermore, I am puzzled by two failures in the proposals. The law that was referred to by Mr. Skora, Public Law 86-726, indicated a Federal policy with respect to protection of material where Government "facilities, service, or information" was used; I would urge that the same provision be made for protecting the public interest in documents which result from Government employees using material exclusively or substantially available to them as a result of their Government employment, irrespective of whether it was part of their duties.

I am also puzzled by the failure to head into the very serious problem of contractors for publication--where the Government hires an organization for the very purpose of writing a document--and still no provision is made to cover that particular item. I think this is an exceedingly important aspect of this problem. And, if I may be so bold to say so, I think the failure to deal with it, at least even discuss it, makes something of a mockery of dealing with this problem, in view of the tremendous proportion of Government materials that are being prepared in that particular way.

This, to me, raises the second point of the second sentence. That public funds are involved is vital; I think when we are dealing with other people's money this does make a difference. And, as I pointed out, there is a statute that already covers this, P.L. 86-726. Your proposal would, in effect, mean that a "Government publication" means nothing, because you do not know whether it is public or not public. At the very least, as a matter of practice (and I have been arguing principle) whether or not it is published by the Government certainly ought to be evidentiary value as to whether it is within the scope of the duty of the individual. And this would be prevented when you say it should "not be affected by..."

As to the last sentence in section (a)--I'll stop at that point although I have some points on section (c)--frankly, I think this could lead to shenanigans as it has in the past. And if what is being attempted is what George Cary has implied, which is a very real point--that you're trying to build up a manuscript collection, or you are trying to get some other materials--why not face that directly? Why not say what you want, instead of covering it by this general language which brings in all other materials and allows for a means of evading the principle asserted at the beginning--that these are to be in the public domain?

Consequently, I think you can see, Mr. Kaminstein, that I have some very real difficulties with subsection (a).

KARP. I would think that there are at least two general interests involved. One is to protect the public by making available to it those which are truly public documents. And the second is, at the same time, to protect an individual who happens to be (a) an author, and (b) a Government employee, and who happens to be writing while he is a Government employee, but who isn't writing what anybody could fairly call a "public document."

I would think that this definition in (a), with which I have no quarrel, gives the Government and the public a better break. I think it's much more restrictive on the individual author than "within the scope of his employment," although I have no objection to it. In other words, I think it covers a greater area of writing, putting it into the area of "Government publications," than would the other definition, because this doesn't say "that which he writes because he was required to write it," but it says "that which he writes in the course of executing the duties that he was required to perform."

I think it does expand that concept. He might write something that wasn't within the scope of his employment, but which he wrote while he was executing duties that required him to write. Memoranda written by a General while he was executing duties of his command, or in the performance of his duties, might well fall within this definition and be a "Government publication," while under the "within the scope of his employment," definition they would not.

On the other end, though, I would prefer to see section (c) eliminated in its entirety. I think that there is no purpose served from the point of view of the public, the Government, or the individual author involved, in permitting any exceptions. I think that what you open the door to here is the use of copyright to suppress public documents. And you also open the door to Government subsidization of one publisher or another by giving him the benefit of the copyright in a work created at public expense.

MANGES. The Joint Copyright Committee of the book publishing industry has considered this subject very carefully, and is especially interested in subdivision (c). It believes that there should be a body that could grant exceptions--in cases involving the national interest, for example. It does not believe that body should be the Congressional Committee on Printing. It would much prefer the alternative suggestion which was in the Register's Report, namely the Director of the Budget, because it is believed the Director of the Budget would be in a position to treat this subject much more objectively, and would be much more distant from political pressures.

With regard to Government contractors, the Committee believes that they should be permitted in certain cases to obtain copyrights where the Government is of the view that it is not in as good a position to publish the work, or where the Government believes that the Government Printing Office is not in a position to publish the work. The Committee does not wish to have the Government in competition with publishers in the ordinary case. But it realizes that there may be certain exceptional cases where it is better to have the Government in a position to take out copyright, and in those cases it is thought that exceptions should be granted.

SCHIFFER. I'd like mainly just to ask a question: whether it is the position, Mr. Cary, now, that foreign governments cannot secure U. S. copyright and the U. S. Government does not secure copyright abroad. That doesn't seem very clear to me, but the Government agencies seem to be concerned principally with their desire to secure copyright overseas--which doesn't seem to arise out of this provision at all.

CARY. Well, in many of the European countries governments do have copyright; for example, in Great Britain we have the Crown Copyright. On the other hand, in countries like France, I believe, the individual writer who is employed by the government has the copyright; the government does not have it. The matter of government protection is not at all clear, I agree with you.

SCHIFFER. Well, the question then is: has the United States Government ever sought to secure copyright overseas in its works?

CARY. I do not know whether they have or not. I've never heard of a case.

KAMINSTEIN. Well, the case wouldn't arise, since much or all of the foreign protection would be automatic. But let me answer the reverse part. We have interpreted the present law as permitting foreign governments to secure copyright here.

LINDEN. With respect to subsection (c), some of us here were present when Mr. Luther Evans spoke before the Copyright Luncheon Circle, and one remark which was intended, I assume, as a throw-away, impressed itself upon my mind. Very often in the course of one's duty--or within the scope of one's employment as a Government employee or official--one collects a good deal of data or material. If there were an "incentive," that information would become available to the public. Accordingly, and leaving aside for the moment whether it ought to be the Printing Office or some other committee to be designated, it seems to me that under those special circumstances there ought to be an exception to the prohibition of copyright protection on published works of the kind set forth in subsection (a).

Another point that I would like to make reference to is whether the contractors or subcontractors ought under any special circumstances be permitted to achieve copyright protection in the works written or composed primarily for the benefit of an agency of the Government. I think we're all familiar with the practical economic aspects of negotiation of contracts, and it would seem to me that, under certain circumstances, those representing the Government would find it quite beneficial economically to allow the contractor the incentive of being in a position to achieve some revenue from private publication, subsequent or otherwise, of the work.

And therefore, with those two points in mind, I certainly would like to endorse some kind of provision similar to subsection (c).

SCHULMAN. Well, what I was about to say has been answered by many others. First of all, in regard to (c), I think that that's essential if we're to maintain the integrity of some works abroad. I think it would be difficult to protect United States publications abroad if we could not protect them here.

Now, as I view it, the protection is not to make money out of them, or to prevent knowledge about them, or to establish censorship, but merely to protect their integrity and prevent distortion.

As far as the question of taking by eminent domain is concerned, I think the Government took over a great many copyrights during the war through the Alien Property Custodian, and nobody seemed to have any objection to that.

I think that this is a fair proposition. I think that private contractors should get copyright on the work that they do, because they write a great deal which is not directly paid for. And I was rather surprised to hear Mr. Rosenfield say that Government employees

don't have to write. I had three stints with the Government, and Lord knows I used a pencil and a pen very much. I had to submit a report on almost everything I did. But what I did at home, and what I had written for various reviews and other publications, was on my own time.

I think what I did on my own time I should be able to claim as my own property. And I think there is a fair distinction between that and the things that a Government employee does while executing the duties of his employment. That is the principle of the Dubilier case--what he does as part of his duties is controlled by the Government, and there we say there should be no copyright, but what he does otherwise is his own property and should be treated as such.

KELLMAN. I just wanted to emphasize the points made by Mrs. Linden and Mr. Schulman, and to point out that sometimes a publication written by a Government employee as a private citizen, which even to a general extent duplicates a Government publication, can be more useful and more informative than the Government publication because of the literary skill and the liberality with which he has written it.

I think that in this complicated day and age the more communication we encourage the better off we are. And I have gotten a great deal of information, in my own career and life, with respect to Government functions, from reading books written by private people who had been Government employees. I think that every effort should be made to increase the incentive for these books.

MCDONALD. I direct my remarks to subparagraph (a). We have been laboring under a mere reference to "Government publications" in the statute, and it is desirable to have a definition somewhat along these lines. I agree with what Mr. Irwin Karp said about the unduly restrictive nature of this definition. At the end of the fifth line, the reference to "in the course of executing" is a very broad phrase, which might encompass all acts done "while executing," or "not inconsistent with." And I suggest that it would be better, in such a definition, to say "created by an official or employee of any department, agency, office, branch, or service of the United States Government under orders or as a required part of executing his duties (or the duties) of his office or position."

I believe that there was no intention to change the existing law as indicated by a few cases. And it might be helpful to cite one which in my opinion shows a set of facts very close to the line. When Captain Sherrill was an instructor at Fort Leavenworth his job was to teach map-making. He took it upon himself to write a monograph which became used as a text. This was printed on the

Government press, the Leavenworth press. Nevertheless, in this District, it was decided that he did not lose his rights. They did not belong to the Government, because he was not required to write a textbook to accompany his course.

Now, if we refer in our definition to "written in the course of executing his duties," I think that Captain Sherrill might very well have lost that case under this definition. I recommend, therefore, that it be made more specific in this respect.

In the next sentence--"The availability of copyright protection shall not be affected..."--I would suggest a slightly different approach, because in the beginning of this subparagraph we talk about "copyright protection...shall not be available." If we are to change the beginning of this second sentence so that it reads "The unavailability of copyright protection shall not follow as a matter of course from the use of United States funds, etc.," it would be more consistent as a matter of draftsmanship.

And in the third sentence--where reference is made to "owning copyright in unpublished works"--as we all know, some unpublished works may be copyrighted, but this seems to raise the question in this section as to whether all unpublished works are subject to copyright protection. I would attempt to avoid that here and meet it elsewhere by saying, "Nothing in this subsection shall preclude the United States from initially owning all rights in unpublished works"--because, certainly, until a work is published, the Government should own what its employees have written under orders or as a required part of executing their duties.

ROSENFIELD. I would like to address myself to (c) if I may. I find myself a little embarrassed to disagree point-blank with Mr. Schulman, but I think this proposal is wrong both in principle and in practice, and perhaps suffers from Constitutional difficulties.

In my judgment Freedom of Press is not subject to sale because it is expensive to the United States Government. I think we are dealing here with something a little different from the ordinary copyright situation, that the Constitutional guaranty of the First Amendment for Freedom of Press was directed <u>against</u> the Government. And therefore it is a quite different picture that we face here from that faced in the ordinary copyright situation.

In principle, we're dealing here with the public's right to public documents, and it doesn't make any difference on that score that it is more expensive to publish them without copyright, or even that they may be perverted outside the United States' borders. There is a higher principle established in the Constitution, in the First Amendment.

Secondly, in practice I think the proposal is wrong, because it will envisage all kinds of politicking, whether it is to be administered by a Government agency, an Executive agency, as was suggested before, or a Congressional agency. I was not aware that Executive agencies were exempt from politics.

Furthermore, in passing, if you are dealing with the public interest involved, why cannot the public be heard on this issue? Your proposal would permit the requesting agency to make a representation to whichever agency is permitted to authorize the copyrighting, without any contrary opportunity to anyone else whatsoever to be heard. This would all be done hush-hush, and nobody would get an opportunity to protest exemptions from the no-copyright principle. If it is the public interest that we are talking about, why is not the public given an opportunity to deal with it? And we know very well that the public would not be given such opportunity under your proposal.

I might point out, as to the suggestion of the Director of the Bureau of the Budget, that the last time that the Director of the Bureau of the Budget dealt with this problem he recommended that Government publications be published privately to save Government money. That was his principal interest, not the overriding right of the American people's "Right to Know."

Therefore, both in principle and practice, I find myself obliged to disagree with Mr. Schulman and with the Register's suggestion. I might add, although I have not done any research on this aspect, that I have a visceral feeling that there may be a Constitutional objection to the particular proposal of having the Joint Committee exercise this executive authority. Either it is a Congressional decision or an Executive decision, and we might run into the problem of the Constitutional right of a Congressional committee to make this kind of a decision. I am sure that other people have researched this, and I may be wrong. But I present this particular observation as a further possible objection to (c) in its present or in any other form.

In brief, I think (c) ought to be excluded completely as being wrong as a matter of fundamental law, and in being undesirable both as a matter of principle and practice.

PILPEL. I just want to say that I cannot see any question of the applicability of the First Amendment here. As I recall that amendment,

it provides that Congress shall make no law abridging rights of freedom of speech or of the press. The same Constitution gives Congress the right to confer copyright protection. But the provision against copyright in Government publications is not in the Constitution. It's only in the Copyright Act, isn't that correct?

So, I repeat, I would think that any discussion of First Amendment principles is irrelevant here. The basic questions which have been raised have to do rather with whether the formulations in this section will meet some of the pressing questions in this field. I'm not at all clear that the words "...created by an official or employee...in the course of executing the duties required of him" answers most of the questions with which most of us are concerned.

For example, suppose a lot of material was created by a Federal Government official in the course of his executing his duties, but he is no longer executing any duties at all. In other words, he is a past employee. Does the proposed solution mean that in these circumstances he can or cannot utilize in his private copyrighted writings material previously transmitted to his employer or superior officer? I realize no statute can answer all specifics, but I think that this section is so worded that it may not advance the cause of answering any specifics at all.

I'd also like to address myself to subdivision (d), and to a rather specific problem as to which, perhaps, consideration has been given. And that is the situation where unpublished material is going to be published for the first time by the United States Government, but it does not in any sense belong to the Government. I refer, for example, to a study, let's say, made under private auspices by a prominent physicist who is asked to testify before a Congressional Committee. Now this might be covered if, in the second line, the reference to "copyright" is deemed to include common law as well as statutory copyright, but it's not clear to me that it does include common law copyrights at the present time. This problem of witnesses being unwilling to testify before Congressional Committees as to their findings because of fear that their material will appear in the Congressional Record and thus go into the public domain is one which has been presented to me several times, and one which I think is worthy of consideration.

Finally, I note that there is a statement that "as a condition to the publication of such material...," etc., and I wonder whether consideration has been given in this connection to the fact that sometimes you may not be in a position to ask the consent of the owner.

Mr. Olsson's point is the point I am pressing here. In other words, a Government agency is, like everybody else, protective of its own status. A Government agency is no different from any private office in this regard. I never knew a private office that liked to have its goods stolen, or any Government office. They are going to be protective of themselves. And experience has shown, in fact, extreme censorhip--the refusal to permit admittedly Government documents to be used without a prior indication of what precise use was to be made of them, and of exactly what you were going to quote. And the answer is that it is none of their business. If this is a Government document, which should be in the public domain, they have no right to inquire about that.

Secondly, if I may, I would like to take Professor Nimmer's point on the Rand Corporation. I quite agree with him that, if the Government both pays and publishes, certainly this ought not be copyrighted by Rand.

But if you use Professor Nimmer's compromise, look at what you subject yourself to. The Rand Corporation publishes a mimeographed copy and puts "Copyright" on it. There are three copies in existence, and the third copy is sent to the Government Printing Office for publication. Is this improbable? This is exactly what has happened. And what I am suggesting is that, if you accept the theory that when the Government orders something and pays for it 100 percent it ought to be in the public domain if the Government publishes it, then it seems to me the dynamics of evasion of this require you to go further. And I would suggest to Professor Nimmer that he look at the actual experience with the Rand Corporation and some of these other things, to see that the dynamics of evasion are exactly what he is talking about.

KAMINSTEIN. Before you answer, Professor Nimmer, Ted Jackson will you...?

JACKSON. I just wonder why it is necessary to give the Government protection in unpublished works. And I wondered whether Mr. Olsson's comments concerning the news media's need for free access to Government material wouldn't apply equally to that situation, as well as to the Government deciding which special published material should not be available.

NIMMER. If I may reply to Mr. Rosenfield, it seems to me Mr. Rosenfield is throwing out the baby with the bath. True, there can be borderline situations such as the one you suggest, and perhaps even evasion--although quaere whether, if they are shown to be evasions, the rule would apply.

But as against the borderline situations and as against the evasions--in order to guard against that--what it seems to me you would be doing is saying in effect that the Government may not give grants to private scholars, private people who want to make serious studies but who want to be able to own and command the rights in what they do. Where the Ford Foundation, or Rockefeller, or whoever, may be quite willing to do this, and permit the scholar or whoever it is to keep the results or proceeds from his work, you would preclude the Government from making similar grants.

I think if this were done it would seriously inhibit progress of science and the useful arts, to not coin a phrase. So, just because there are borderline situations, I don't think that this is the answer.

KARP. Depending on one's political philosophy, the fact that the Government copyright may prevent the making of grants may or may not be a good thing. But I wouldn't think that giving money to somebody as a grant would necessarily constitute employing him, or making him in any way a contractor of the Government. So I can see no reason why the making of a grant, which is clearly a grant, would prevent copyrighting a work. It's a gift, a subsidy, a donation. It's not employment.

NIMMER. Pardon me, but this whole thing arose from my suggestion that the Government immunity should be extended to the independent contractor situation, where its not employment, in the limited situation where the Government both pays for it and does the publishing through governmental facilities. It seems to me that this is an independent contractor, although not an employee situation.

KARP. In fact, I think another distinction is that when you give a poet a grant to write poetry, you are ordinarily not telling him what you want him to produce, and you're not doing it because you want him to produce a particular result. When you hire the Rand Corporation to make a study, or a contractor to do something that you want for some specific use, I think there's quite a bit of a distinction, a definitional distinction.

KAMINSTEIN. Miss Pedersen, would you like to close?

PEDERSEN. I would like to ask Professor Nimmer, in your Rand example are you also including the fact that the independent contractor was engaged to produce a specific work?

NIMMER. Yes, it is ordinarily true of an independent contractor that there is no supervision of the way a thing is done, but there is an agreement in advance as to the result which is hoped to be achieved. I think anybody getting a grant has to undertake that he is going to try to achieve a given result.

KAMINSTEIN. I should like to echo the Librarian's comment this morning and thank you for coming down. We will meet again soon.